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No. 83-1171

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EXXON CORPORATION, *et al.*,

Petitioners,

v.

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

Enacted on November 9, 1978, the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (Supp. V 1981) ("NGPA"), prescribed "maximum lawful prices" for all "first sales" of natural gas, effective December 1, 1978. Congress expressed these ceiling prices in dollars and cents "per million Btu's". The court of appeals vacated a rule of the Federal Energy Regulatory Commission ("Commission"), which interprets the NGPA and prescribes a method for accurately determining the Btu content of natural gas sold and delivered in first sales for purposes of applying these congressionally-established ceiling prices.

The questions presented are:

1. Whether the court of appeals violated established principles of judicial review (i) by failing to limit its review to whether the Commission's interpretation of the NGPA is reasonable and (ii) by substituting its own view that, in applying NGPA ceiling prices, the Commission must use a measurement procedure which understates the number of Btu's actually delivered and thereby effectively reduces the ceiling prices established by Congress.

2. Whether the court of appeals erred in disregarding the authority vested in the Commission by Sections 501(a) and (b) of the NGPA to define terms and to administer, implement and enforce the statute.

PARTIES TO THE PROCEEDINGS

Petitioners in this case*, all of whom participated in the case below, are: Aminoil Inc.; Amoco Production Com-

* In accordance with Rule 28.1, the list of parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates is included at App. 224a-235a.

pany; ARCO Oil and Gas Company, Division of Atlantic Richfield Company; Chevron U.S.A. Inc.; Conoco Inc.; Exxon Corporation; Getty Oil Company; Gulf Oil Corporation; Mobil Oil Corporation; Mobil Oil Exploration and Producing Southeast, Inc.; Mobil Producing Texas and New Mexico, Inc.; Pennzoil Company; Phillips Petroleum Company; Phillips Oil Company; Placid Oil Company; Shell Oil Company; Sun Exploration and Production Company; The Superior Oil Company; Tenneco Oil Company; Texaco Inc.; and Union Oil Company of California.

In addition, the parties below were: the Federal Energy Regulatory Commission; Associated Gas Distributors; El Paso Natural Gas Company; General American Oil Company of Texas (now Phillips Oil Company); Houston Oil & Minerals Corporation; Interstate Natural Gas Association of America; Laclede Gas Company; Lone Star Gas Company; Louisiana Land and Exploration Company; Michigan Wisconsin Pipeline Company; Mississippi River Transmission Corporation; Natural Gas Pipeline Company of America; Northern Natural Gas Company; Panhandle Eastern Pipe Line Company; Texas Gas Transmission Corporation; Transcontinental Gas Pipe Line Corporation; Trunkline Gas Company; United Gas Pipe Line Company; and Valero Transmission Company.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Exxon Corporation, *et al.* (Petitioners), an *ad hoc* group of natural gas producers listed at the conclusion, petition for a writ of certiorari to review the August 9, 1983, decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit (App. A) is reported at 716 F.2d 1 (D.C. Cir. 1983). The orders denying rehearing and rehearing *en banc* (App. 153a, 154a-155a) are not reported.

The orders of the Federal Energy Regulatory Commission (App. B) are reported as follows: Order No. 93, 45 Fed. Reg. 49077 (July 23, 1980); Order No. 93-A, 15

F.E.R.C. ¶ 61,075, at 61,169 (1981); Order Denying Applications for Rehearing of Order No. 93-A and Limited Stay of Order Nos. 93 and 93-A, 16 F.E.R.C. ¶ 61,077, at 61,144 (1981); Order Vacating Order Denying Rehearing of Order No. 93-A and Limited Stay of Order Nos. 93 and 93-A, 16 F.E.R.C. ¶ 61,142, at 61,324 (1981); Order Granting Partial Stay of Order Nos. 93 and 93-A Pending Further Order, 16 F.E.R.C. ¶ 61,143, at 61,325 (1981); and Order Vacating Partial Stay and Amending Regulations, 47 Fed. Reg. 614 (January 6, 1982). The pertinent portions of the "Interim Regulations" promulgated by the Commission (App. 93a-118a) are reported at 43 Fed. Reg. 56448-56459, 56533-56536, 56544, 56546, 56550 (December 1, 1978).

JURISDICTION

The judgment of the court of appeals (App. 147a-152a) was entered on August 9, 1983. The orders denying petitions for rehearing and suggestions for rehearing *en banc* (App. 153a, 154a-155a) were entered on October 19, 1983.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statute upon which the court of appeals' decision is based is the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (Supp. V 1981), the relevant excerpts of which appear at App. 159a-183a. The Commission's regulation (18 C.F.R. § 270.204) appears at App. 188a. Excerpts of the Natural Gas Act, 15 U.S.C. §§ 717-717w (1976 & Supp. V 1981), and of the Federal Power Act, 16 U.S.C. §§ 791a-825r (1976 & Supp. V 1981), appear at App. 184a-186a and App. 187a, respectively.

STATEMENT

In enacting the Natural Gas Policy Act of 1978 ("NGPA")[1], Congress made a basic change in the way that regulated sales of natural gas are priced, shifting from a volumetric (Mcf) method of stating ceiling rates, which had been the practice of the Commission[2] under the Natural Gas Act of 1938 ("Gas Act")[3] to a heating value (Btu) method. This shift was an integral part of Congress' basic decision to abandon the cost-based, utility-type method of producer regulation, and instead to relate ceiling prices to the value of alternate fuels. The common denominator among natural gas, liquid petroleum fuels and coal is heating value.

Prior to the NGPA, the Commission had used a Btu measurement rule that understated the actual Btu content of the gas sold. After enactment of the NGPA, the Commission adopted a regulation to provide for an accurate determination of the Btu's sold. The court of appeals vacated this regulation.

A. Historical Background

Under the Gas Act, the Commission had established maximum rates for sales of natural gas in interstate commerce for resale by producers. These rates were determined on a cost-of-service basis; the estimated costs of finding and producing gas were divided by the estimated volume of gas to be produced, yielding a rate per unit of volume (*i.e.*, dollars per Mcf). App. 70a-72a. These volumetric rates were developed first on an individual company cost-of-service basis, thereafter on an "area rate" basis and

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[1] 15 U. S. C. §§ 3301-3432 (Supp. V 1981).

[2] The Federal Power Commission and its successor, the Federal Energy Regulatory Commission, are each referred to herein as "Commission," as may be appropriate.

[3] 15 U. S. C. §§ 717-717w (1976 & Supp. V 1981).

later on a "national rate" basis using composite, industry-wide cost data.[4]

While many producer contracts for such sales provided that the prices would be adjusted to reflect the Btu content of the gas, the Commission did not allow any price adjustments for Btu content in determining ceiling rates until 1965.[5] Thereafter, the Commission altered these adjustments over time, eventually permitting a proportional increase in the ceiling rates, expressed in amounts per Mcf, for gas containing more than 1,000 Btu's per cubic foot, and requiring a proportional decrease for gas with a lower Btu content.[6] Notwithstanding these Btu adjustments in establishing volume-based rates, the Commission never attempted to reflect precisely the value of the Btu content of the gas. *Cf., e.g., National Rates, supra,* 56 F.P.C. at 578-584, 612-622; *id.* at 2765-2769, 2773-2774.

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[4] *Public Service Commission* v. *Mid-Louisiana Gas Co.*, Nos. 81-1889, *et al.*, slip op. at 8-11 (June 28, 1983); *see also, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 755-757, 759-764, 800-813 (1968); *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 288-289 & n.3, 292-293 & n.7, 296-300, 301-306 (1974); *American Public Gas Association* v. *FPC*, 567 F.2d 1016, 1027-1028 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978); *see, also* App. 70a-72a.

[5] *Texaco Inc.*, 33 F.P.C. 1228, 1236-1238 (1965) *reh. denied*, 34 F.P.C. 129, *clarified*, 34 F.P.C. 1098 (1965).

[6] *National Rates For Jurisdictional Sales Of Natural Gas*, 56 F.P.C. 509, 602, *reh. denied*, 56 F.P.C. 2698, 2807-2808 (1976), *aff'd sub nom. American Public Gas Association* v. *F.P.C.*, 567 F.2d 1016 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978).

In earlier cases, the Commission had allowed proportional upward adjustments for gas containing more than 1,050 Btu's per cubic foot and required downward adjustments for gas containing less than 1,000 Btu's per cubic foot. *E.g., Permian Basin Area Rate Cases*, 390 U.S. at 762, 809-810 & n.91; *Area Rate Proceeding (Southern Louisiana Area)*, 46 F.P.C. 86, 143-144, *reh. denied*, 46 F.P.C. 633 (1971), *aff'd sub nom. Placid Oil Co.* v. *FPC*, 483 F.2d 880 (5th Cir. 1973), *aff'd sub nom. Mobil Oil Corp.* v. *FPC*, 417 U.S. 283 (1974).

Thus, the Commission's rates were never expressed on a "per million Btu" ("MMBtu") basis.

Although the adjustments for Btu content varied over time, the Commission required producers to determine Btu content on a "saturated" basis for purposes of applying these Btu adjustments,[7] because the Commission required the interstate pipelines to report the Btu content of purchased gas on a "saturated" basis in their annual reports.[8] *Texaco Inc., supra,* 33 F.P.C. at 1236-1237.[9] As explained more fully in the "Technical Background" below, the "saturated" (or "wet") Btu determination overstates the amount of water vapor actually contained in gas sold and delivered, and, concomitantly, understates the Btu content of the gas. *E.g.* App. 10a, 68a-69a.

Intrastate sales and producers' direct sales to consumers in interstate commerce were not subject to regulation under

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[7] Many contracts for such regulated sales, and for unregulated sales discussed below, however, provided that Btu content would be determined at, or corrected to reflect, actual delivery conditions. *See, e.g.,* American Gas Association, Gas Measurement Committee Report No. 4A, *Natural Gas Contract Measurement And Quality Clauses,* 7, 19 (1st ed. 1971) (App. 199a, 212a) (hereinafter "AGA Report 4A"); *cf., e.g.,* App. 60a. The contracts for unregulated sales, and for regulated sales made at prices below the ceiling rates, were permitted to operate according to their terms.

[8] The Commission, however, did not require the interstate pipelines to determine Btu content on a "saturated" basis in establishing the rates at which they resold gas to their customers. The Commission permitted these pipelines to determine the Btu content of gas which they resold on a "dry" basis for ratemaking purposes. At the present time, 19 of the 32 major interstate pipelines use the "dry" test to determine the Btu content of the gas they sell.

[9] Methods then actually used in measuring the Btu content of gas purchased by the interstate pipelines varied widely. *Texaco Inc., supra,* 33 F.P.C. at 1244.

the Gas Act. For this reason, the parties to such sales were not required to measure Btu content on a "saturated" basis.[10] In such unregulated sales, the sales contract determined the method of measuring Btu content. Many of these unregulated contracts in effect before the enactment of the NGPA provided that Btu content measured at saturated conditions be adjusted to reflect the actual Btu content of the gas as delivered.

On November 9, 1978, the NGPA was enacted, effective December 1, 1978. In this statute, Congress exercised its legislative authority, theretofore delegated to the Commission under the Gas Act, to establish new maximum lawful prices for first sales of natural gas. The NGPA states these ceiling prices for the first sales of natural gas in dollars and cents "per million Btu's." The NGPA defines "Btu" as a "British thermal unit" (§ 2(30), 15 U.S.C. § 3301(30)), and separately defines "Mcf" (§ 2(29), 15 U.S.C. § 3301 (29)). The NGPA also vests the Commission with the authority to "administer" the NGPA and to issue rules and orders (§ 501(a), 15 U.S.C. § 3411(a)), and "to define, by rule, accounting, technical, and trade terms used in [the NGPA]" (§ 501(b), 15 U.S.C. § 3411(b)).

On December 1, 1978, the Commission promulgated its "interim regulations." Section 270.204 of the interim regulations describes a test standard for measuring the number of Btu's contained in a cubic foot of gas under certain

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[10] Before the passage of the NGPA, only one of the major producing states regulated the prices which producers could charge for natural gas sold in intrastate commerce. This state, New Mexico, permitted the prescribed base price per Mcf to be adjusted to reflect the "Btu content" of the gas. New Mexico "Natural Gas Pricing Act," 1977 N. Mex. Laws, Ch. 73, § 4F, amended, 1981 N. Mex. Laws, Ch. 317, codified, N. Mex. Stat. Ann. § 62-7-3F (Michie 1982 Cumulative Supp.). New Mexico allows the Btu content of natural gas sold subject to its statute to be determined on the basis of the Btu's actually delivered.

"standard" laboratory conditions. App. 36a, 117a-118a. One test condition prescribed in Section 270.204 is that the Btu content be measured with the gas "saturated with water vapor". App. 117a.

Recognizing the short time between the notice and promulgation of its interim regulations, "the Commission solicit[ed] comments on all aspects of these regulations" and stated its intent to review the regulations and make changes deemed appropriate. App. 113a. These additional comments, including those filed by Petitioners, were considered by the Commission before it issued final regulations. In Order No. 93 (App. 35a-42a) issued July 16, 1980, the Commission promulgated one of these final regulations. The Commission stated in Order No. 93 that Section 270.204 merely described a test standard for measuring the number of Btu's contained in a cubic foot of gas under "standard" test conditions. The Commission made clear that the results obtained under the described saturated test conditions "must be converted to figures that reflect the actual condition of gas on delivery to properly price the gas." App. 38a.

In Order No. 93-A (App. 42a-77a), the Commission denied requests for rehearing of Order No. 93. The Commission held that the number of MMBtu's sold in a first sale is "the number of MMBtu's actually delivered" (App. 45a, 54a, 56a), and that the correction to actual delivery conditions should be applied effective as of December 1, 1978, the effective date of the NGPA (App. 46a n.7, 63a-64a). The Commission noted that in contrast to the Commission's volumetrically-based pricing scheme under the Gas Act, the ceiling prices established by Congress in the NGPA are energy-based, *i.e.*, expressed in terms of a price for each million Btu's of energy content of gas being sold. App. 50a, 56a-57a, 70a-73a. For this reason, the Com-

mission concluded that the correction to reflect the actual energy content of the gas stream had to be applied because under the NGPA, energy is the ceiling price determinant. App. 54a, 59a.

On August 9, 1983, the court of appeals vacated the Commission's rule, finding that Congress had implicitly adopted the "saturated" (or "wet") method of Btu measurement set out in the Commission's Gas Act regulations. App. 26a, 32a-33a. The court of appeals required use of this method, but conceded that the Commission's Gas Act regulations yielded an inaccurate and understated Btu content (App. 10a) and that neither the NGPA nor its legislative history contained any express provision requiring such an understatement (App. 22a-23a.). The court of appeals further found that because this measurement standard had been implicitly adopted by Congress, the Commission now lacks discretion to change, even prospectively, the method of measuring Btu content even though the Commission had discretion under the Gas Act to prescribe this method in the first place. App. 32a-33a.

B. Technical Background

In practice, the number of million Btu's[11] sold is determined by measuring both the total volume ("Mcf's")[12] and

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[11] A British thermal unit ("Btu"), a commonly used unit of energy or heating value, is the amount of heat required to raise the temperature of one pound of water one degree Fahrenheit. 18 C.F.R. § 270.102(b)(2) (1983); Williams and Meyers, *Manual of Oil and Gas Terms*, 74 (5th ed. 1981) ("Btu").

The term "MMBtu" means one million Btu's. 18 C.F.R. § 270.102 (b)(3) (1983).

[12] The volume of natural gas is measured in "Mcf's." The NGPA defines "Mcf" as "1,000 cubic feet of natural gas measured at a pressure of 14.73 pounds per square inch (absolute) ["psia"] and a temperature of 60 degrees Fahrenheit." NGPA § 2(29), 15 U.S.C. § 3301(29).

the Btu content [13] of the gas. AGA Report 4A at 7 (App. 199a). The seller's revenues are determined by multiplying the Btu content by the volume of gas delivered and then multiplying that product by the applicable maximum lawful price. App. 44a n.5.

The Btu content of any given volume of natural gas depends on the particular mix of combustible hydrocarbon gases (*e.g.*, methane, butane and propane) and non-combustible gases (*e.g.*, water vapor and carbon dioxide), in that volume (App. 9a, 67a; AGA Report 4A at 7, 10-11 (App. 199a, 202a-203a)), and the temperature and pressure at which the volume and Btu content of gas are measured (App. 67a-68a; AGA Report 4A at 5-6, 7 (App. 198a, 199a)).[14] Because water vapor is not combustible, its presence reduces the Btu content of natural gas by displacing combustible hydrocarbons in a given Mcf of gas. App. 10a, 54a, 66a, 67a, 69a.

The natural gas industry uses different test procedures for measuring Btu content.[15] All of the test procedures are valid as long as the test conditions, including whether the gas was "saturated" with water vapor or "dry", are stated and adjusted, as necessary, to reflect the actual state of the gas being delivered.

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[13] The "Btu content" is the number of Btu's per cubic foot (or MMBtu's per Mcf) of gas at a specified pressure and temperature. *Texaco Inc., supra*, 33 F.P.C. at 1239 (¶D); 18 C.F.R. § 270.204 (b) (1983).

[14] Both pressure and temperature significantly affect the number of molecules present in a unit volume of gas. App. 67a-68a.

[15] AGA Report 4A at 7 (App. 199a) ("The trend appears to be toward the expression of the Btu [content] on an assumed dry basis as opposed to the antiquated water saturated basis since currently the actual conditions of fuel gas transported to market in high pressure pipelines is essentially dry."); *see also, id.* at 19 (App. 212a.); *Standards of Calorimetry for Gaseous Fuels*, Case No. 4720, General Order No. 58-B at 2 §§ 3f and g (Cal. PUC Dec. 28, 1955; effective Jan. 7, 1956) (App. 219a).

The terms "wet" rule and "dry" rule, which were used by the court of appeals to refer to the Commission's Gas Act and NGPA rules, respectively, are misleading in the sense that they suggest that the two rules simply describe different technical methods to measure gas. This is not correct. Under the so-called "dry" rule, the Commission adopted a two-step procedure under which Btu content is first determined using standard laboratory test conditions and then adjusted to reflect the actual Btu content of the gas as delivered.[16] The so-called "wet" rule consists of only the first step and does not apply the correction needed for an accurate determination of the Btu content of the gas being sold.

If the Btu content is measured on a "saturated" (or "wet") basis, the laboratory test sample of gas contains substantially more water vapor than the gas does when it is delivered to the purchaser. App. 68a-69a. This "saturation" is achieved by bubbling the test sample of gas through water. This bubbling changes the composition of the test sample by adding water vapor and displacing Btu-producing hydrocarbons. The added water vapor is equivalent to approximately 820 pounds of water vapor per one million cubic feet ("MMcf") of gas. App. 69a. This amount of

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[16] The court of Appeals' description of the Commission's procedure under the NGPA for determining the Btu content of gas as the "dry rule" is a misnomer. Under the Commission's procedure, the Btu content is measured with the test sample of gas saturated with water vapor, then the test result is corrected to reflect actual delivery conditions. For example, if the gas were saturated with water vapor at the delivery conditions, the Commission's procedure would determine the Btu content of the gas reflecting the actual water vapor content of the gas. Thus, the Commission's procedure yields an accurate determination of the Btu content of gas regardless of the amount of water vapor in the gas. The court of appeals, however, prohibited the use of the second step of this procedure, which corrects the test measurement result for actual delivery conditions.

water vapor far exceeds the amount of water vapor which is (i) permitted by most gas sales contracts (App. 60a, 68a-69a, AGA Report 4A at 12-13, 20 (App. 205a, 213a)), and (ii) physically contained in the gas at typical delivery conditions (App. 54a n.16). At typical delivery conditions it is physically impossible for the gas to contain even 70 pounds of water vapor per MMcf. App. 58a, 69a, 72a, 77a. Indeed, if gas were delivered at typical pipeline pressures with the water vapor content required by the laboratory test, the water vapor would condense, filling the pipeline with water and preventing delivery of the gas. *See* App. 66a.

The addition of such substantial quantities of water vapor to the test sample thus produces a "measured" Btu content which is less than the Btu content of the gas which the purchaser actually receives. App. 68a-69a, 73a. If this "measured" Btu content is not corrected to reflect the actual delivery conditions, the purchaser pays for fewer Btu's than he receives and the seller is paid for fewer Btu's than he delivers.

If the test results are to reflect correctly the actual number of Btu's delivered to the purchaser, the number of Btu's measured by the laboratory test must be corrected to offset the water vapor added to the sample to perform the test. *See* App. 68a-69a, 73a. The Commission so found in the orders below, stating:

> The Commission is aware that the water vapor content or pressure of the gas when tested may be different . . . than the conditions that obtain when the gas is delivered. Therefore, the results obtained under test conditions, be they those in the rule or others, must be converted to figures that reflect the actual condition of the gas on delivery in order to properly price the gas.[17]

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[17] App. 38a.

The court of appeals conceded that the "saturated" (or "wet") test, which the Commission had used under the Gas Act, resulted in an inaccurate measurement of the Btu's actually delivered to the purchaser. That court said:

> This rule was known as the "wet" rule because it required the gas sample to be saturated with water vapor at a temperature and pressure combination where the capacity of natural gas to absorb water vapor is markedly higher than that existing at the temperature and pressure conditions under which most natural gas is sold. In practical effect, therefore, the wet rule tended to overstate water vapor content for gas which, when actually delivered, was neither saturated with water vapor nor delivered at the "standard" temperature or pressure. *See* FERC Order 93-A, Technical Appendix, *reprinted* in JA 63. This overstated water vapor content, in turn, caused an understatement in the number of Btu's assumed to be in the test sample of natural gas.[18]

SUMMARY OF REASONS FOR GRANTING THE PETITION

Although the court of appeals acknowledged that the Commission's Gas Act "wet" rule yields an inaccurate and understated Btu content determination, that court nevertheless held that the NGPA required the Commission to preserve this rule and precluded the Commission from adopting a rule to correct the "wet" measurement to reflect actual Btu content of gas at actual conditions. The action of the court of appeals is founded on two erroneous predicates.

First, the court of appeals erred in determining that it could substitute its interpretation of the NGPA for the reasonable interpretation of the Commission that the NGPA's ceiling prices "per million Btu's" may be collected for the

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[18] App. 10a.

MMBtu's actually delivered. The court of appeals substituted its construction of the statute for that of the Commission so as to understate the MMBtu's actually delivered, notwithstanding the absence of any express guidance in either the statute or the legislative history to support the court's own reading. Thus, the court of appeals erred by failing to limit its review to whether the Commission's interpretation is reasonable, in conflict with the guidelines for judicial review set by this Court.

Second, the court of appeals erred in substituting its judgment for the Commission's exercise of its congressionally-delegated authority. If Congress did not address the issue of Btu content measurement by stating the NGPA's ceiling prices per MMBtu's, the Commission is vested with the authority to resolve the question. Under Section 501 of the NGPA, the Commission is authorized "to define, by rule, accounting, technical, and trade terms" used in the NGPA, and to administer, implement and enforce the statute. Accordingly, if the matter were left unresolved by Congress, the Commission, not the court of appeals, is vested with the authority to devise a reasonable rule. Rather than deferring to the Commission's reasonable exercise of its authority, the court of appeals vacated the Commission's rule, which the court criticized as "hyper-accurate" (App. 30a), and required the Commission to substitute in its place a measurement rule which the court of appeals admitted is inaccurate. App. 10a.

The result of the court of appeals' decision is to prevent producers from being paid for all of the Btu's which they deliver, effectively reducing the ceiling prices established in the NGPA by the amount of the inaccuracy. This inaccuracy is applicable to virtually every first sale of regulated gas sold and delivered in the United States since December 1, 1978. Accordingly, the financial importance of this case is enormous.

Based on the precedents of this Court governing the proper standards of judicial review of agency actions, the court of appeals decision should be reversed.

REASONS FOR GRANTING THE PETITION

I. In Vacating The Commission Orders In This Case, The Court Of Appeals Erred By Substituting Its Interpretation Of The NGPA For The Commission's Reasonable Interpretation.

A. The Commission's Interpretation Is In Accord With Precedent Of This Court.

As this Court previously has observed, Congress in enacting the NGPA "fundamentally" and "comprehensively" altered the natural gas ceiling price structure. *Public Service Commission* v. *Mid-Louisiana Gas Co.*, Nos. 81-1889, *et al.*, slip op. at 1-2, 11-14 (June 28, 1983). In the NGPA, Congress itself established ceiling prices,[19] withdrawing from the Commission the authority to set ceiling rates for first sales under the just and reasonable standard of the Gas Act.[20]

The court of appeals found that Congress implicitly adopted the Commission's Gas Act method of measuring Btu content. App 26a, 33a. Based on this finding, that

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[19] All "first sales" were originally subject to price ceilings. Certain "first sales" were deregulated on November 1, 1979, under Sections 107(c)(1)-(4) and 121, 15 U.S.C. §§ 3317(c)(1)-(4) and 3331.

[20] Under the NGPA, the Commission retained authority to *increase* ceiling prices for certain categories of gas if found just and reasonable. 15 U.S.C. §§ 3314(b)(2), 3316(c), 3319(b)(2). The Commission was given no authority, however, to decrease these prices. *Pennzoil Co.* v. *FERC*, 645 F.2d 360, 379 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982). The Commission is also given the authority to establish incentive prices for certain high cost gas. 15 U.S.C. § 3317(c)(5).

court vacated the Commission's two-step procedure under which Btu content is first measured at "standard" laboratory conditions and then corrected to reflect the actual water vapor and energy content of the gas as delivered.[21]

This Court previously has rejected an attempt to engraft requirements adopted by the Commission under the Gas Act onto the NGPA where such requirements are incompatible with the new comprehensive ceiling price scheme adopted by Congress in the NGPA. In *Public Service Commission* v. *Mid-Louisiana Gas Company, supra*, this Court had before it a Commission order which had construed the NGPA as excluding certain pipeline production from coverage by the NGPA's ceiling prices. The Commission's reading of the statute was based on its view that the NGPA had not mandated a change from the Commission's regulation of pipeline production under the Gas Act. This Court rejected the Commission's interpretation as contrary to the "comprehensive" ceiling price structure in the NGPA that replaced the Commission's Gas Act rates and practices. This Court concluded that in the absence of a clear directive in the NGPA to continue the Commission's Gas Act regulation for pipeline production, no exclusion from the NGPA's ceiling prices could be implied.

The Commission's action here is consistent with this Court's reading of the NGPA articulated in *Mid-Louisiana*. The Commission declined to continue its Gas Act "wet" rule because that rule is incompatible with the NGPA's

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[21] Contrary to the apparent understanding of the court of appeals (App. 8a), the Commission in providing for this correction did *not* require a change in its Gas Act practice of measuring the heating value of gas at "standard" laboratory test conditions. Rather, the Commission determined that, if measured at "standard" test conditions, the Btu content must be corrected to reflect actual delivery conditions in order to give effect to the NGPA's energy-based ceiling prices.

new pricing scheme. In the absence of an express directive in the NGPA to preserve the prior Gas Act practice, the Commission properly declined to continue it.

B. The Commission's Interpretation Is Reasonable And In Accord With The Language and Legislative History Of The NGPA.

In providing for the determination of actual energy content under the NGPA, the Commission has given effect to the language of the statute that ceiling prices be established "per million Btu's."[22] As this Court has frequently admonished, statutory construction must begin "with the language of the statute itself."[23] And "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."[24] In construing the language of the statute, it is presumed that "the legislative purpose is expressed by the ordinary meaning of the words used."[25]

The NGPA ceiling prices unequivocally apply "per million Btu's." Section 2(30) of the statute, defining "Btu", plainly affirms that Congress had no intention to deviate from the universally accepted meaning of the term as a specific — and accurately measurable — quantum of energy. Thus, the language of the NGPA sets natural gas ceiling

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[22] Sections 102 through 109 of the NGPA (15 U.S.C. §§ 3312-3319) establish ceiling prices "per million Btu's". For example, NGPA Section 102(b) establishes a maximum lawful price of "$1.75 per million Btu's in the case of April, 1977", and applies that ceiling price, in subsection (a), "to any first sale of natural gas" which is "new natural gas" or certain gas from old Outer Continental Shelf leases. See, 15 U.S.C. § 3312(a) & (b).

[23] *Howe* v. *Smith*, 452 U.S. 473, 480 (1981).

[24] *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

[25] *Richards* v. *United States*, 369 U.S. 1, 9 (1962).

prices on the basis of a specific quantum of energy. These prices apply to nothing more and to nothing less.

The Commission concluded that these ceiling prices could be implemented in accordance with the statute only by a rule that accurately determines Btu content. There is no statutory support for any assertion that the ceiling prices apply to less than the actual number of Btu's delivered. A Commission regulation permitting natural gas sellers to overstate the number of Btu's actually sold and delivered through the artifice of a "measurement" rule would not survive judicial scrutiny. Such a rule would be a transparent circumvention of the ceiling prices established by Congress. Likewise, a rule understating the number of Btu's sold and delivered, such as that ordered by the court of appeals, is no less repugnant to the language of the NGPA.

The Commission's construction of the NGPA is supported by the legislative history. From the time the legislation was first proposed, the intent was to bring prices for newly discovered gas up to par with its commodity value. As Administration spokesman Dr. James Schlesinger testified before Congress during the early stages of deliberation:

> The thrust of the Administration's recommendation on new natural gas pricing is to abandon the concept of cost-based pricing, which made sense only when gas was a surplus product, and to adopt instead a rate structure predicated upon the commodity value of new gas. The commodity value pricing approach pegs the price of new natural gas to its most readily available substitute, oil.[26]

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[26] Hearings Before the Committee on Energy and Natural Resources, United States Senate, 95th Cong., 1st Sess., Publication No. 95-33 at 159 (May 3, 1977).

As the legislative history of the NGPA makes clear, to accomplish this goal ceiling prices were tied to the Btu equivalent price of alternative fuels. For example, the new natural gas price (ultimately covered by Section 102 of the NGPA) under the House version of the bill was "equal to the Btu equivalent to the average refiner acquisition cost of domestic crude oil", while in the Senate bill it was "equal to the 'current' Btu equivalent price of No. 2 fuel oil landed in New York City".[27]

The selection by Congress of a "million Btu's" as the NGPA's pricing unit was "inherent in the congressional intent to establish incentive prices based on the commodity value of alternative energy sources".[28] In order to ensure that natural gas is priced in relation to the Btu equivalent price of other fuels, the Commission properly provided that the pricing basis must be the actual number of MMBtu's delivered to the purchaser:

> Because of a very clear physical difference between natural gas and other fuels, true comparison can only be achieved by applying the prescribed maximum lawful price to the number of MMBtu's in a volume of gas at delivery conditions rather than to some theoretical quantity such as the number of MMBtu's at standard conditions. This is true because, unlike other fuels, which are either liquid or solid as opposed to gaseous, water vapor in natural gas displaces hydrocarbon compounds, resulting in a diminution of heating value of the natural gas.[29]

The inescapable conclusion is that the court of appeals' decision frustrates the statutory purpose to price gas according to its energy value.

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[27] H.R. Rep. No. 95-1752, 95th Cong., 2d Sess., 67-68 (1978).

[28] App. 50a.

[29] App. 54a. The court of appeals admitted that the wet rule is inaccurate. App. 10a.

The Commission's interpretation of the NGPA is reasonable and should have been upheld. The court of appeals erred in refusing to follow the precedents of this Court, which make clear that, in interpreting a statute, a court is not free to substitute its interpretation for a reasonable interpretation by the agency charged with implementing that statute.

In *Federal Election Commission* v. *Democratic Senatorial Campaign Committee*,[30] this Court recently outlined the deference that should be accorded the interpretation of an agency, like the Commission in this case, in which Congress has vested primary and substantial responsibility for administering and enforcing a statute. There, this Court stated that:

> [T]he task for the Court of Appeals was not to interpret the statute as it thought best but rather the narrower inquiry into whether the Commission's construction was "sufficiently reasonable" to be accepted by a reviewing court .... To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.[31]

This Court also has stated "that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong [.]" *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S.

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[30] 454 U.S. 27 (1981).

[31] *Id.* at 39 (Citation omitted) *See also, Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), quoting *Power Reactor Development Co.* v. *International Union of Electricians*, 367 U.S. 396, 408 (1961), where the Court stressed that deference is particularly appropriate when the interpretation is a contemporaneous construction of a statute " 'by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.' "

367, 381 (1969). There are no compelling indications that the Commission's construction in this case is wrong. Applying this standard of review to the instant case mandates that the decision of the court of appeals be reversed.

C. The Interpretation Of The Court Of Appeals Is Unreasonable And Should Be Reversed.

By itself, the failure of the court of appeals to show that the Commission's interpretation of the NGPA is unreasonable is sufficient grounds to reverse that court's decision.[32] However, reversal is particularly appropriate here because the court of appeals' own interpretation is unreasonable. The court of appeals offers only its own speculations to support its improbable conclusion that Congress implicitly intended ceiling prices be applied to inaccurately measured deliveries of gas energy.[33]

First, the court of appeals muses that "the wet rule establishes the only method of measuring Btu's with which Congress was *likely* to have been familiar"[34] because it was the rule used by the Commission in regulating prices of producers' sales of gas in interstate commerce for resale under the Gas Act. This assertion has no foundation. Under the NGPA, Congress "extended federal price regulation to the intrastate gas market" for the first time.[35] Similarly, the NGPA regulates for the first time the prices charged in producers' direct sales to consumers in interstate com-

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[32] "[The Court] need only conclude that [the Commission's interpretation] is *a* reasonable interpretation of the relevant provisions" to uphold it. *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, Nos. 82-34, *et al.*, slip op. at 20 (May 16, 1983) (emphasis in original).

[33] App. 26a-33a.

[34] App. 26a (emphasis added).

[35] *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, No. 81-1370, slip op. at 4 (January 24, 1983).

merce. Before the effective date of the NGPA, the parties to such unregulated sales provided, by contract, the procedure for calculating the Btu content of gas sold. There is no basis for assuming that Congress intended to adopt implicitly the Commission's practice with respect to interstate sales for resale previously regulated under the Gas Act rather than to adopt the industry practices in the previously unregulated markets, to which the Commission's Gas Act regulations had no applicability.

Second, the court of appeals speculates that there is a "*likelihood* that Congress *may well have assumed* that the 'Mcf' and 'MMBtu' bases of natural gas pricing were far more interchangeable than the Commission realized. . . ."[36] In the NGPA, Congress specifically and separately defines and uses the terms "Mcf" and "Btu".[37] The former is a unit of volume and the latter a unit of energy. Congress demonstrated it knew the difference by its separate and distinct use and definition of the terms, selecting the unit of energy as its pricing unit and using the unit of volume for other purposes.[38]

Third, the court of appeals characterizes the Commission's dry rule as "hyper-accurate" and unjustified because Congress "was *not necessarily* adverse to the use of 'standard' assumptions underlying the wet rule".[39] As an example of Congress' use of standard assumptions the court of appeals referred to the Energy Tax Act of 1978

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[36] App. 29a (emphasis added).

[37] 15 U.S.C. §§ 3301(29), (30).

[38] For example, Congress utilized the volumetric unit, Mcf, to specify the production threshold for stripper wells but utilized the energy unit, "MMBtu," to set the stripper-well ceiling price. 15 U.S.C. §§ 3318(a), (b)(1).

[39] App. 31a (emphasis added).

("ETA").[40] App. 30a-31a. This reference is misplaced. The court of appeals relies on provisions that were contained only in a House version of that legislation.[41] However, the ETA, as enacted, does not contain these provisions. Thus, the ETA provides no support for the court of appeals' interpretation of the NGPA.

In sum, the court of appeals' decision is based on speculation and a misreading of the statute and its legislative history. The decision provides no basis for vacating the Commission's reasonable interpretation of the NGPA.

II. In Vacating The Commission Orders In This Case, The Court Of Appeals Erred In Disregarding The Authority Vested In The Commission By Congress Under The NGPA.

The court of appeals concluded that neither the statutory language nor the legislative history of the NGPA expressly mandated use of either the "wet" or "dry" measurement rule.[42] If the court of appeals were correct on this point, that court erred in proceeding to interpret the NGPA as requiring the Commission to preserve the uncorrected "wet rule" on the basis of the court's view that it was "logical" to "assume" that this result was intended by Congress.[43] If the issue were left unaddressed by Congress, the court of appeals was obligated to leave resolution of the issue to the Commission.

The court of appeals' decision rests on its conclusions that Congress had not delegated to the Commission "the choice of methodologies or definitions," and the Commission "was given 'no independent authority under the NGPA

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[40] Pub L. No. 95-618, 92 Stat. 3174-3205 (1978).

[41] H. R. Rep. No. 95-496, Part III, 95th Cong., 1st Sess., 97 (1977).

[42] App. 22a-23a.

[43] App. 22a-23a, 32a-33a.

to define "Btu" ' ".[44] These conclusions are contrary to the explicit administrative and definitional authorities which Congress conferred on the Commission by Sections 501(a) and (b) of the NGPA,[45] and conflicts with decisions of this Court construing similar provisions of the Gas Act and Federal Power Act.[46]

In the NGPA, Congress specifically authorized the Commission to resolve technical issues which Congress left unresolved. Section 501(a) of the NGPA specifically empowers the Commission to administer and to enforce the NGPA[47]. In addition to this general authority, Section 501(b) authorizes the Commission "to define, by rule, accounting, technical, and trade terms used in [the NGPA]."[48]

The Conference Committee Report confirms the breadth of the Commission's authority under Section 501:

> The conference agreement provides definitions for several terms. The conferees have provided the Commission authority to define additional terms as necessary for the purpose of implementing this Act under the authority provided in [Section] 501(b). *The conferees also provide the Commission authority to refine definitions of terms provided in the Act in a manner that is consistent with the definitions provided.*[49]

This explanation confirms that Sections 501(a) and (b) empower the Commission to administer the NGPA and to

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[44] App. 32a.

[45] 15 U.S.C. §§ 3411(a) and (b).

[46] Sections 501(a) and (b) of the NGPA are similar to Section 16 of the Gas Act (15 U.S.C. § 717o) (App. 184a) and Section 309 of the Federal Power Act (16 U.S.C. § 825h) (App. 187a).

[47] 15 U.S.C. § 3411(a).

[48] 15 U.S.C. § 3411(b).

[49] H.R. Rep. No. 95-1752, 95th Cong., 2d Sess., 69 (1978) (emphasis added).

adopt the two-step procedure set forth in Order Nos. 93 and 93-A which accurately determines the Btu content of natural gas at actual delivery conditions. Here the Commission has exercised its statutory authority by taking the reasonable and common-sense step of "refining" the definition of "Btu" set forth in the NGPA[50] so as to make explicit that the pricing unit is not to be altered by reason of inaccurate measurement methodologies.

The court of appeals overstepped its role as a reviewing court in vacating the Commission's reasonable action. As this Court has previously held, under the Gas Act, "Congress has entrusted the regulation of the natural gas industry to the informed judgment of the Commission, and not to the preferences of reviewing courts."[51] A reviewing court may not supplant the Commission's decision "'with one more nearly to its liking'...."[52]

The court of appeals provides no basis for its decision to interfere in the Commission's exercise of its statutory authority. If, indeed, Congress were silent on the question of Btu content measurement, it was not silent on its intent that the Commission was to implement the technical details of the NGPA.

Where Congress has not provided express guidance, this Court has admonished that a reviewing court must not simply substitute its judgment for that of an agency after a fruitless "section-by-section search" for express guidance in the "literal words of the statutory provisions."[53] It is not a "reasonable canon of interpretation" that a legisla-

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[50] 15 U.S.C. § 3301(30).

[51] *Permian Basin Area Rate Cases*, 390 U.S. at 767.

[52] *Mobil Oil Corp.* v. *FPC*, 417 U.S. at 308; *accord, e.g.*, *FERC* v. *Pennzoil Producing Co.*, 439 U.S. 508, 517-519 (1979).

[53] *American Trucking Associations* v. *United States*, 344 U.S. 298 309-10 (1953).

ture can provide specific guidance on every detail. Rather, the absence of such detail

> is precisely one of the reasons why regulatory agencies such as the Commission are created, for it is the fond hope of their authors that they bring to their work the expert's familiarity with industry conditions which members of the delegating legislature cannot be expected to possess.[54]

This Court, in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*,[55] has previously cautioned courts of appeals against usurping administrative authority:

> The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action. . . . Administrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute, . . . not simply because the court is unhappy with the result reached.[56]

In reversing the Commission's interpretation of the NGPA, the court of appeals has acted contrary to these principles and substituted its view for that of the Commission. In doing so, the court of appeals overstepped the bounds of its reviewing authority under Section 506 of the NGPA,[57] and "usurped an administrative function."[58]

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[54] *Id. at* 310 (citations omitted).

[55] 435 U.S. 519 (1978).

[56] *Id.* at 558.

[57] 15 U.S.C. § 3416.

[58] *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 17 1984
ALEXANDER L. STEVAS
CLERK

83-1171

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

EXXON CORPORATION, *et al.*,
Petitioners,

v.

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *et al.*

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES REQUIRED BY RULE 28.1

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* Petitioners have printed only those portions of the "Interim Regulations" which are relevant to the Btu question; the other portions of the "Interim Regulations" are not relevant to the issues before the court of appeals or before this Court.

† Petitioners have printed only those portions of the "Notice Of Proposed Rulemaking" which are relevant to the Btu question; the other portions of the "Notice Of Proposed Rulemaking" are not relevant to the issues before the court of appeals or before this Court.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1690

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

MOBIL OIL CORPORATION, ET AL.,
GENERAL AMERICAN OIL COMPANY OF TEXAS,
PHILLIPS PETROLEUM COMPANY,
PENNZOIL COMPANY,
MISSISSIPPI RIVER TRANSMISSION CORP.,
SHELL OIL COMPANY,
EXXON CORPORATION,
LACLEDE GAS COMPANY,
GETTY OIL COMPANY,
LOUISIANA LAND & EXPLORATION COMPANY,
ASSOCIATED GAS DISTRIBUTORS,
NORTHERN NATURAL GAS COMPANY,
TEXAS GAS TRANSMISSION CORPORATION,
TEXACO, INC.,
TENNECO OIL COMPANY,
HOUSTON OIL AND MINERALS CORPORATION,
GULF OIL CORPORATION,
PLACID OIL COMPANY,
AMINOIL, USA, INC., ET AL.,
Intervenors

No. 81-1680

MICHIGAN WISCONSIN PIPELINE COMPANY,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

MOBIL OIL CORPORATION, ET AL.,
AMOCO PRODUCTION COMPANY,
GENERAL AMERICAN OIL COMPANY OF TEXAS,
PHILLIPS PETROLEUM COMPANY,
PENNZOIL COMPANY,
EXXON CORPORATION,
SHELL OIL COMPANY,
TENNECO OIL COMPANY,
UNION OIL COMPANY OF CALIFORNIA,
LOUISIANA LAND & EXPLORATION COMPANY,
GETTY OIL COMPANY,
ASSOCIATED GAS DISTRIBUTORS,
LACLEDE GAS COMPANY,
SUN OIL COMPANY,
ARCO OIL & GAS COMPANY,
PLACID OIL COMPANY,
TEXACO, INC.,
GULF OIL CORPORATION,
Intervenors

No. 81-1691

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

MOBIL OIL CORPORATION,
GENERAL AMERICAN OIL COMPANY OF TEXAS,
PHILLIPS PETROLEUM COMPANY,

PENNZOIL COMPANY,
SHELL OIL COMPANY,
ASSOCIATED GAS DISTRIBUTORS,
GETTY OIL COMPANY,
LOUISIANA LAND & EXPLORATION COMPANY,
TEXACO, INC.,
EXXON CORPORATION,
SUN OIL COMPANY,
TENNECO OIL COMPANY,
HOUSTON OIL AND MINERALS CORPORATION,
GULF OIL CORPORATION,
PLACID OIL COMPANY,
Intervenors

No. 81-1692

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

MOBIL OIL CORPORATION, ET AL.,
GENERAL AMERICAN OIL COMPANY OF TEXAS,
PHILLIPS PETROLEUM COMPANY,
PENNZOIL COMPANY,
SHELL OIL COMPANY,
LACLEDE GAS COMPANY,
ASSOCIATED GAS DISTRIBUTORS,
GETTY OIL COMPANY,
LOUISIANA LAND & EXPLORATION COMPANY,
TEXACO, INC.,
SUN OIL COMPANY,
CHEVRON, USA,
EXXON CORPORATION,
TENNECO OIL COMPANY,
HOUSTON OIL AND MINERALS CORPORATION,
GULF OIL CORPORATION,
PLACID OIL COMPANY,
Intervenors

No. 81-1696

LONE STAR GAS COMPANY,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

GENERAL AMERICAN OIL COMPANY OF TEXAS,
PHILLIPS PETROLEUM COMPANY,
PENNZOIL COMPANY,
SHELL OIL COMPANY,
LACLEDE GAS COMPANY,
LOUISIANA LAND & EXPLORATION COMPANY,
GETTY OIL COMPANY,
ASSOCIATED GAS DISTRIBUTORS,
VALERO TRANSMISSION COMPANY,
TEXACO, INC.,
EXXON CORPORATION,
SUN OIL COMPANY,
TENNECO OIL COMPANY,
HOUSTON OIL AND MINERALS CORPORATION,
GULF OIL CORPORATION,
PLACID OIL COMPANY,
PANHANDLE EASTERN PIPE LINE CO., ET AL.,
Intervenors

No. 81-1802

LACLEDE GAS COMPANY,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

No. 82-1004

LONE STAR GAS COMPANY,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

EXXON CORPORATION,
CONOCO INC.,
GENERAL AMERICAN OIL COMPANY OF TEXAS,
PENNZOIL COMPANY,
TENNECO OIL COMPANY,
UNION OIL CO. OF CALIFORNIA,
GETTY OIL COMPANY,
AMINOIL USA, INC.,
GULF OIL CORPORATION,
TEXACO, INC.,
MOBIL OIL CORPORATION, ET AL.,
HOUSTON OIL AND MINERALS CORPORATION,
SHELL OIL COMPANY,
ATLANTIC RICHFIELD COMPANY,
SUN EXPLORATION AND PRODUCTION CO.,
Intervenors

No. 82-1177

ASSOCIATED GAS DISTRIBUTORS,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

Petition for Review of Orders of the
Federal Energy Regulatory Commission

Argued November 2, 1982

Decided August 9, 1983

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Karol Lyn Newman, entered an appearance for intervenor, Laclede Gas Company.

Bernard A. Foster, III, entered an appearance for intervenor, Louisiana Land and Exploration Company.

George J. Meiburger, Frank X. Kelly and *John B. Will*, entered appearances for intervenor, Northern Natural Gas Company.

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Before: ROBINSON, *Chief Judge*, MIKVA and SCALIA, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* MIKVA.

MIKVA, *Circuit Judge*: The petitioners in this action, numerous natural gas transmission and distribution companies and their respective trade associations, seek review of a final rule of the Federal Energy Regulatory Commission (FERC or Commission). That rule establishes a new approach to measuring the energy content of natural gas for the wellhead pricing purposes of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. §§ 3311-3333 (Supp. V 1981). Specifically, the new rule requires that the energy content of natural gas be measured under the varying, relatively "dry" conditions at which gas is delivered for sale instead of the uniform, water-vapor saturated, "wet" condition under which the Commission had previously determined the energy content of gas. The petitioners argue that the new rule, by defining energy content in a way unforeseen by Congress, effectively

raises the wellhead prices of natural gas above the maximum ceiling prices established by Congress in the NGPA. Alternatively, the petitioners argue that the rule was adopted without adequate notice and comment under the Administrative Procedure Act; was impermissibly given retroactive effect; and failed to guarantee wholesale gas purchasers automatic pass through of any retroactive payments they may be forced to make. We agree that the rule violates the NGPA's statutory pricing scheme and accordingly vacate the Commission's rule.

I. BACKGROUND

A. *Technical and Historical Background of the "Wet" Rule*

The energy content of natural gas is measured in terms of British thermal units (Btu's), each Btu representing the amount of energy needed to raise the temperature of one pound of water one degree Fahrenheit, *see Texaco, Inc.*, 33 F.P.C. 1228, 1240 n.5 (1965). The Btu content of any given stream of natural gas will vary, however, depending on the gas' particular mix of combustible and noncombustible constituents. Natural gas is primarily composed of combustible hydrocarbons such as methane, propane, butane, ethane, and natural gasoline. Yet, natural gas contains small amounts of noncombustible substances as well. Of particular importance to the present case is the fact that natural gas often contains relatively small amounts of water vapor. *See* FERC Order 93-A, Technical Appendix, *reprinted in* Joint Appendix (JA) 59, 63, 73. Because water vapor contains no available heat energy, its presence in any given volume of natural gas will reduce the Btu content of the gas by displacing energy-producing hydrocarbons. *Id.* at 61.

Prior to the passage of the NGPA, the Commission (and its predecessor, the Federal Power Commission) measured the Btu content of natural gas for the purpose

of making "quality adjustments" to the gas rates set by the Commission under the Natural Gas Act of 1938 (NGA), 15 U.S.C. §§ 717a-717w (1976 & Supp. V 1981). Although the varying amounts of water vapor in natural gas streams could affect the gas streams' relative Btu values, the Commission sought to factor out this relatively small variable—to ensure ease of measurement and consistency among samples—by determining Btu content under laboratory conditions that standardized the amount of water vapor at a convenient, albeit arbitrary, level. *See* Government Brief at 5 n.9 & 8 n.12. Specifically, the Commission promulgated a rule requiring the Btu content of a gas stream to be determined on the basis of a test volume of gas (1.0 cubic foot), saturated with water vapor at a specified, conveniently obtained temperature and pressure (60° F. and 30 inches of mercury). *See* 18 C.F.R. §§ 2.56a(c)(1), 2.56b(d)(1) (1982) (post- and pre-1973 gas, respectively). This rule was known as the "wet" rule because it required the gas sample to be saturated with water vapor at a temperature and pressure combination where the capacity of natural gas to absorb water vapor is markedly higher than that existing at the temperature and pressure conditions under which most natural gas is sold. In practical effect, therefore, the wet rule tended to overstate water vapor content for gas which, when actually delivered, was neither saturated with water vapor nor delivered at the "standard" temperature or pressure. *See* FERC Order 93-A, Technical Appendix, *reprinted in* JA 63. This overstated water vapor content, in turn, caused an understatement in the number of Btu's assumed to be in the test sample of natural gas.

Despite its relative inaccuracy, however, the Commission's "wet" Btu determination enjoyed the advantages of widespread industry acceptance and consistent agency implementation. Originally proposed in a policy statement during the Commission's administration of gas rates under the Natural Gas Act, *see* Fed. Reg. 4,614 (1961),

the wet rule was expressly sanctioned by the Commission in *Texaco, Inc.*, 33 F.P.C. 1228 (1965), in which the Commission noted that the rule was accepted by the American Society for Testing Materials and the natural gas industry as a whole, *id.* at 1236-37. *See also Sunray DX Oil Co.*, 29 F.P.C. 1079 (1963). The wet rule was carried forward into the Commission's area rate proceedings under the NGA, *see Area Rate Proceeding (Southern Louisiana Area)*, 46 F.P.C. 86, 143-44 (1973); *Area Rate Proceeding, Docket No. AR61-1*, 34 F.P.C. 159, 223-24 (1965), and into its national rate proceedings under the NGA as well, *see National Rates for Jurisdictional Sales of Natural Gas*, 56 F.P.C. 2698 (1976); *Just and Reasonable National Rates for Sales of Natural Gas*, 54 F.P.C. 3090 (1975); *Just and Reasonable National Rates for Sales of Natural Gas*, 52 F.P.C. 1604, 1630, 1651-52 (1974). Indeed, in its first national rate proceeding, the Commission specifically rejected an argument by natural gas producers that, because gas generally is sold to pipelines and distribution companies in a much "drier" condition than that defined in the wet rule, the Commission should adopt a more accurate "as delivered" or "dry" definition of Btu content:

> The Producers argue that the heating content (Btu) 'of the gas should be adjusted for the water vapor content in the gas as it is delivered.' In *Texaco, Inc.*, the Commission determined that Btu adjustments should be made on the saturated basis. This is the basis which was utilized in the area rate proceedings, and is the basis that will be adopted in this proceeding.

52 F.P.C. at 1630.

Thus, at the time Congress passed the NGPA in 1978, the Btu content of natural gas had been defined by the Commission in terms of a standardized, saturated condition for over fifteen years. As codified in the Commission's rules of practice, the wet rule provided:

> The Btu content of the natural gas used in computing this rate adjustment [under the NGA] shall be the number of British thermal units (Btu) produced by the combustion, at constant pressure, of the amount of the gas which would occupy a volume of 1.0 cubic foot at a temperature of 60° F. *saturated with water vapor* and under a pressure equivalent to that of 30.00 inches of mercury at 32° F. and under standard gravitational force (980.665 centimeters per second squared) with air of the same temperature of the gas and air and when the water formed by combustion is condensed to the liquid state.

18 C.F.R. §§ 2.56a(c)(1), 2.56b(d)(1) (1982) (emphasis added). The precise language of the wet rule becomes an important reference point for the petitioners' procedural objections to the Commission's post-NGPA change of course.

B. *The Procedural History of the "Dry" Rule*

Title I of the NGPA establishes a detailed scheme of maximum ceiling prices for various categories of natural gas sold to pipelines and local distribution companies. Although these maximum "wellhead," or "first sale," prices vary among different categories, the NGPA expresses the price of each category on a "per million Btu" (per MMBtu) basis. Thus, for example, section 108 of the Act sets a maximum lawful price for "stripper well" gas at $2.09 per MMBtu as of May 1978 (subject to small, monthly adjustments thereafter for inflation and real growth) and section 109 of the Act sets a maximum price for certain gas produced from Prudhoe Bay, Alaska at $1.45 per MMBtu as of April 1977 (as adjusted monthly, thereafter, for inflation). *See* 15 U.S.C. §§ 3318, 3319 (Supp. V 1981). Because the prices for all of the

NGPA's categories of gas are expressed per MMBtu, the Commission felt it necessary to specify, in its regulations, how Btu content was to be determined. In doing so, the Commission abandoned the "wet" measurement of Btu's that it had used under the NGA (and indeed still uses for NGA purposes not displaced by the NGPA). In its place, the Commission adopted an "as delivered" rule that measured the Btu content of gas at the conditions under which natural gas is actually delivered for first sales. Because natural gas generally contains far less water vapor under actual delivery conditions than under the saturated, laboratory conditions specified in the wet rule, we refer to the Commission's new rule as the "dry" rule.

The Commission's transition from the wet to the dry rule was heralded by considerable confusion. The NGPA's pricing scheme became law on November 9, 1978, with an effective date of December 1, 1978. Because of the shortness of time in which to devise implementing regulations, FERC decided to promulgate interim regulations on an expedited basis and to revise them, if needed, at a later date. Accordingly, the Commission issued a notice of proposed rulemaking on November 14, 1978; considered all comments received by November 20; and issued its interim regulations on November 29. *See* Notice of Proposed Rulemaking in Docket No. RM79-3, 43 Fed. Reg. 53,270 (1978). The notice also provided for a subsequent, sixty-day comment period on the interim regulations, to form the basis for any appropriate revisions. *Id.*

Among the proposed regulations considered during this expedited interim rulemaking was the Commission's dry rule, designated as section 270.204 of the proposed interim regulations. As originally proposed, however, the Commission's dry rule appeared virtually identical to its long-established wet rule. Proposed section 270.204 provided:

Btu content per unit volume of natural gas

For purposes of determining the number of Btu's per unit volume of natural gas, the Btu content of one cubic foot of natural gas is the number of Btu's produced by the combustion, at constant pressure, of the amount of gas which would occupy a volume of 1.0 cubic foot at a temperature of 60 degrees Fahrenheit, *saturated with water vapor*, and under a pressure equivalent to that of 30.00 inches of mercury at 32 degrees Fahrenheit, and under standard gravitational force (980.665 centimeters per second squared) with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of the gas and air and when the water formed by combustion is condensed to the liquid state.

43 Fed. Reg. at 53,333 (1978) (emphasis added); *compare* 18 C.F.R. § 2.56a(c)(1) (quoted *supra* page 11). Nothing in the prefatory statement accompanying the Commission's proposed regulation gave any indication that section 270.204 constituted a change from the virtually identical text of the Commission's wet rule. The Commission's only explanation of section 270.204 was that it "presents the technical information necessary to determine the number of British thermal units (Btu's) per unit volume of natural gas. This is necessary because maximum lawful prices for first sales of natural gas are stated in terms of dollars per million Btu's." 43 Fed. Reg. at 53,280. No comments were received on the proposed rule during the one-week comment period and, on November 29, 1978, the identical text of the proposed rule was issued as interim regulation 270.204. *See* 43 Fed. Reg. at 56,448.

The subsequent sixty-day comment period on the interim regulation was more lively. During this period, the gas-producing companies which are intervenors in the present case filed written comments objecting to what

they perceived to be the water-vapor saturation requirements of interim regulation 270.204:

> Section 270.204—According to this section, the Btu content of natural gas is to be determined "saturated with water vapor." The result of this "special rule" may be to unlawfully deny producers the right to collect the full statutory rates under the NGPA. By fixing the price on an MMBtu basis, Congress intended that the maximum lawful price should be paid for the gas as delivered by the producer, not as adjusted by regulation.

Joint Supplemental Comments of Indicated Producers, filed Jan. 31, 1978, at 6-7, *reprinted in* Brief of Producer Intervenors, Appendix A at A-1 to A-2. On the basis of comments such as these, the producers filed a petition for rehearing concerning the interim regulations with the Commission in February 1979. *See* Application of Indicated Producers for Rehearing, FERC Docket No. RM79-3, filed Feb. 2, 1979. On April 19, 1979, however, the Commission denied this application without comment. *See* Order Granting in Part and Denying in Part Applications for Rehearing of the Interim Regulations, *reprinted in* Brief of Producer Intervenors, Appendix A at A-5 to A-9. Thereafter, the producers filed for judicial review of interim regulation 270.204 in the United States Court of Appeals for the Fifth Circuit. *See Ecee, Inc. v.* FERC, 645 F.2d 339 (5th Cir. 1981).

On July 16, 1980, almost eighteen months after promulgating interim section 270.204, FERC issued Order 93, adopting the interim regulation as a final regulation, albeit parsing the final text of the regulation into a slightly different format:

> ***Interim regulation § 270.204 is adopted as a final rule***
>
> **§ 270.204 *Btu content per cubic foot of natural gas***
>
> **(a) *Measurement.* The Btu content of one cubic foot of natural gas under the standard conditions**

> specified in paragraph (b) of this section is the number of Btu's produced by the complete combustion of such cubic foot of gas, at constant pressure with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of the gas and air and when the water formed by such combustion is condensed to a liquid state.
>
> (b) *Standard conditions.* The standard conditions for purposes of paragraph (a) of this section are as follows: The gas *is saturated with water vapor* at 60 degrees Fahrenheit under a pressure equivalent to that of 30.00 inches of mercury at 32 degrees Fahrenheit, under standard gravitational force (980.665 centimeters per second squared).

FERC Order No. 93, Final Rule, July 16, 1980, *reprinted in* JA 24 (emphasis added). Although the terms of the final rule tracked, almost verbatim, the terms of the interim rule, the Commission surprised all of the parties in this case by announcing in the "Summary" section of Order 93 that the Btu values obtained under section 270.204 were to be "converted" to figures that reflected the actual water vapor condition of natural gas on delivery:

> Several comments noted that § 270.204 provides that Btu content must be measured on a "saturated with water vapor" basis rather than on the basis of the actual water vapor content of the gas as delivered. The comments asserted that under this rule the seller would be paid for less Btu's than would actually be delivered if the gas were sold on a dry (unsaturated) basis.
>
> This assertion is erroneous. Section 270.204 merely describes the test standard for expressing the number of Btu's contained in a cubic foot under certain conditions. Under this standard, the heat value is

> expressed as the number of Btu's per cubic foot of gas "saturated with water vapor." The Commission is aware that the water vapor content or pressure of the gas when tested may be different than described in this standard, and may also be different than the conditions that obtain when the gas is delivered. Therefore, the results obtained under test conditions, be they those in the rule or otherwise, *must be converted to figures that reflect the actual condition of the gas on delivery in order to properly price the gas.*

FERC Order 93, *supra*, at JA 15-16 (emphasis added).

Although Order 93 rendered moot the "wet rule" issue in the producers' petition for review in the Fifth Circuit's *Ecee* case, it set off a flurry of applications for rehearing by most of the pipeline and gas distribution companies which are presently petitioners in this case. The Commission denied all of these applications for rehearing in Order 93-A, April 24, 1981, *reprinted in* JA 30. In Order 93-A, the Commission for the first time articulated the rationale behind Order 93's controversial explanation of section 270.204. Essentially, the Commission's position was that the NGPA's Btu-based pricing scheme required (1) a more accurate method of measuring Btu's than was required under the old NGA scheme, and (2) a method of measuring Btu's in a volume of gas at "delivery conditions" instead of at "standard conditions." *See* Order 93-A, *supra*, at JA 42-49. To explain why the language of section 270.204 specified these "standard conditions" in the first place, the Commission cryptically stated:

> [Section 270.204] merely describes the standard conditions under which the number of MMBtu's in a volume of natural gas is measured. However, recognizing that actual delivery conditions vary widely and are most often different from the defined standard conditions . . . the results of Btu measurements at the defined standard conditions must be adjusted to account for actual delivery conditions.

Order No. 93-A, *supra*, at JA 32-33. The Commission further stated that its newly explained "as delivered" method of determining Btu content could be made by any reasonable method. JA 55. Moreover, the Commission concluded, because Order 93 had merely "clarified" interim section 270.204, and had not substantively changed it, the effective date of the final dry rule was December 1, 1978 (the effective date of the interim rule) and not September 22, 1980 (the effective date of Order 93). *See* JA 57. Because the December 1, 1978 effective date could result in retroactive payments in the millions of dollars from pipeline and gas distribution companies to gas producers, the Commission specifically provided that pipeline and distribution companies could demonstrate that pass through charges to their customers (rate treatment) would be "appropriate" for any claimed retroactive payments. *See* JA 58.

In response, some pipeline and distribution companies petitioned the Commission for rehearing of Order 93-A and requested a stay of its retroactive application. These petitions were denied on July 30, 1981. *See* Order Denying Applications for Rehearing of Order 93-A and Limited Stay of Order Nos. 93 and 93-A, *reprinted in* JA 89. In June and July 1981, the petitioners filed their petitions for judicial review in this court and, on August 6, 1981, one of the petitioners (Lone Star Gas Company) moved this court for a stay of the dry rule's retroactive application pending a judicial determination on the merits. Before this court could rule on the motion, the Commission *sua sponte* asked for a remand of the record to reconsider the issue of the dry rule's effective date and temporarily stayed the rule's retroactive application pending the Commission's reconsideration. This court allowed remand of the record to the Commission in September 1981, but in December of that same year, the Commission issued an Order reaffirming the dry rule's December 1, 1978 effective date. *See* Order Vacating Partial Stay

and Amending Regulations, JA 126. In this Order, however, the Commission amended the language of section 270.204 by adding a new subsection (c):

> (c) *Application of the maximum lawful price.* The maximum lawful price prescribed by the NGPA and this part for any first sale of natural gas applies to the Btu's actually delivered in that first sale.

JA 133. Because the Commission considered this amendment to be merely another "clarification" of the regulation, it concluded that public notice and comment were unnecessary. JA 131.

C. *The Parties' Arguments*

The primary arguments in this case address two broad questions: (1) whether the NGPA's pricing scheme allows or requires the Commission to promulgate a dry definition of Btu content; and (2) if so, whether the Commission's promulgation of section 270.204 afforded the petitioners adequate notice and opportunity to comment. The petitioners maintain that the NGPA does not allow the Commission to adopt a dry definition of Btu content. They support this position with excerpts from the Act's legislative history suggesting indirect congressional endorsement of the wet rule; supplementally, they point to the absence of congressional criticism of the wet rule as indicating congressional intent to leave the definition of Btu content as it was. In the alternative, the petitioners argue that they were deprived of a meaningful opportunity to comment on the dry rule because the Commission's notice of proposed rulemaking and the "wet" text of interim section 270.204 failed to indicate to the public that a dry rule was even under consideration. Finally, the petitioners complain that the Commission violated their constitutional right to due process by giving retroactive effect to the dry rule—which was announced, at the earliest, in Order 93 on July 16, 1980—as of the NGPA's effective date, December 1, 1978. This retroac-

tive application is compounded, the petitioners add, by FERC's refusal to guarantee pipelines and distribution companies automatic pass through to their customers, under section 601 of the NGPA, 15 U.S.C. § 3431 (Supp. V 1981), of any retroactive "dry Btu" payments that the companies may now be forced to make to natural gas producers.

In response, the Commission posits that its dry definition of Btu content is consistent with the NGPA's pricing scheme and deserves judicial deference. Specifically, the Commission argues that Congress impliedly displaced the inaccurate wet rule by choosing a Btu-based pricing scheme; such a scheme, the Commission concludes, evidences congressional intent to measure Btu's on a more accurate "dry" or "as delivered" basis. Moreover, because its dry rule merely articulates this implicit legislative intent, the Commission maintains that the rule is an "interpretative" rule, outside of the notice and comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 553(b)(c) (1976). Concomitantly, the Commission maintains that its interpretative rule should be given the same December 1, 1978 effective date as the statute that it interprets. In the alternative, the Commission suggests that its notice of proposed rulemaking and the text of its interim rule sufficed to notify petitioners adequately that the subject of Btu measurement was under agency review. Assuming that its dry rule was a properly promulgated but non-interpretative rule, the Commission would still justify the rule's application as of December 1, 1978 because the harm of depriving natural gas producers of their congressionally-allowable prices is claimed to be greater than the harm to pipeline and distribution companies, which assertedly can pass through any legitimate, retroactive payments to their customers. The Commission insists that its refusal to "guarantee" pass through is not meant to deprive the pipelines and distribution companies of pass through under section 601. Rather, the Commission's refusal is said merely to

allow pass through on a case-by-case basis, to ensure that all passed through charges are not "excessive due to fraud, abuse or similar grounds," as provided in section 601(c)(2), 15 U.S.C. § 3431(c)(2) (Supp. V 1981).

The intervenors in this case are twenty-three energy-producing companies. The intervenors take the position that the Commission's dry rule is required by the NGPA; that it is an interpretative rule outside of the APA's notice and comment provisions; and, alternatively, that it is a reasonable legislative rule, promulgated with adequate notice and comment. In addition, the intervenors have moved to dismiss one of the petitioners, Lone Star Gas Company (Lone Star), for lack of jurisdiction. Specifically, the intervenors claim that Lone Star's failure to petition the Commission for rehearing of the final day rule within 30 days of the rule's promulgation in Order 93 precludes it from seeking judicial review of that Order given the jurisdictional prerequisite established in section 506 of the NGPA, 15 U.S.C. § 3416(a)(2) (Supp. V 1981) (denying standing to seek judicial review to any person aggrieved by an order of the Commission who failed to petition for agency rehearing within 30 days after issuance).

II. Discussion

As a threshold matter, we consider the petitioners' contention that the language and legislative history of the NGPA do not allow the Commission to adopt a "dry" definition of Btu content. Should the petitioners prevail in this contention, it would not be necessary to reach the notice and comment, retroactivity, or pass through issues. In evaluating the petitioners' position, and concomitantly the Commission's (and producer-intervenors') contrary view of the statute, it is our responsibility to measure the parties' arguments in light of the language, legislative history, purpose, and structure of the NGPA, according the Commission the traditional respect due an agency's interpretation of the statute it is called upon to enforce.

We begin our analysis by considering the statute's language; "[t]he starting point in every case involving construction of a statute is the language itself." *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 558 (1979). In the present case, however, the dearth of statutory references to water vapor/Btu content calls forth Justice Frankfurter's guidance: "One more caution is relevant when one is admonished to listen attentively to what a statute says. One must also listen attentively to what it does not say." Frankfurter, *Some Reflections on the Reading Statutes*, 47 COLUM. L. REV. 527, 536 (1947). The NGPA does not expressly provide for either a wet or a dry determination of Btu content. Although ceiling prices for virtually every category of natural gas are set on a "per MMBtu" basis, *see* 15 U.S.C. §§ 3312-3319 (Supp. V 1981), the statute merely defines the term "Btu" to mean "British thermal units," 15 U.S.C. § 3301 (30).

Undaunted by the lack of statutory text, some of the parties seek to quarry congressional intent from Congress' silence. The petitioners, for example, argue that Congress, having not spoken to the Btu measurement issue, "cannot be held to have required a change in the long-standing practice of measuring Btu content on a saturated basis." *See, e.g.*, Brief of Petitioners Michigan Wisconsin Pipe Line Company, et al (Michigan Wisconsin Brief) at 24. In response, the producer-intervenors insist, "[h]ad Congress intended to preserve the imprecise water saturation assumption . . . it could easily have done so in [the definitional section] of the NGPA." Brief of Producer Intervenors at 14. These thrusts and parries, however, reflect a duel of wooden maxims that has little discernible relationship to the meaning of the NGPA. However, revealing congressional acquiescence in administrative action may be in more pointed, focused contexts, *see, e.g., Bob Jones University v. United States*, 51 U.S.L.W. 4593 (U.S. May 24, 1983), there are no

indications in the NGPA's legislative history to suggest that Congress' failure to define expressly Btu content indicates, by itself, a conscious policy preference for either the wet or the dry rule. The wisdom of Justice Frankfurter's admonition to consider what a statute fails to say should not be taken as a cue for sloganeering; generally, the use of canons of construction are appropriate when they aid, rather than displace, the search for statutory meaning. *Cf.* Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 903 (1982) (rules of construction should not blindly substitute for appropriate inquiry into statutory purpose).

Both the Commission and intervenors suggest that the "as delivered" rule is required by the NGPA's repeated reference to "natural gas *delivered* during any month." *See* 15 U.S.C. §§ 3312(a), 3313(a), 3314(a), 3315(a), 3316(a), 3317(a), 3318(a), 3319(a) (Supp. V 1981) (emphasis added). We find this reading to be without foundation. Nothing in the NGPA's language or legislative history links the phrase, "delivered during any month," to a particular type of Btu measurement. Rather, the statute focuses on the month of "delivery," as opposed to the date of the sale or the date of the natural gas contract, to determine the proper month for applying the appropriate ceiling price and accompanying monthly inflation and growth adjustments. *See* 15 U.S.C. § 3311(b)(4) (Supp. V 1981) ("The maximum lawful ceiling prices under this subchapter . . . (B) shall apply to the month of delivery without regard to the date of the sale or the date of the contract under which the sale occurs . . . ."). Thus, for example, section 3312 provides that the maximum lawful price of new gas "*delivered during any month*" shall be:

> (1) $1.75 per million Btu's, *in the case of April 1977*; and

(2) *in the case of any month thereafter*, the maximum lawful price, per million Btu's, prescribed under this subsection for the preceding month multiplied by the monthly equivalent of a factor equal to the sum of—

(A) the annual inflation adjustment factor *applicable for such month*; plus

(B) (i) .035, *in the case of any month beginning before April 20, 1981*; or

(ii) .04, *in the case of any month beginning after April 20, 1981.*

15 U.S.C. § 3312(a)(b) (Supp. V 1981) (emphasis added). The very particularity with which Congress identifies the price adjustments attending the month of delivery (to the thousandth's place, in some instances) makes it extremely unlikely that Congress would use the phrase, "delivered during any month," without further specification, to denote obliquely a change from the wet to the dry method of measuring Btu's—a change which, we are told, may affect the overall amounts paid for natural gas by the hundreds of millions of dollars. In short, the Commission fails to convince us of any necessary connection between the delivery point at which the price of gas is fixed and a "dry" determination of Btu content. Indeed, the Commission itself has established that a "wet" measurement of Btu content was properly used during rate determinations under the NGA, despite the fact that the underlying NGA commodity unit was also measured on an "as delivered" basis. *See* Order 93-A at 13, *reprinted in* JA 42. ("Although the commodity priced was volume rather than heating value, the NGA, too, priced the commodity on an as-delivered basis.").

The Commission's argument thus boils down to the shift from the commodity unit under NGA ratemaking

where gas was priced by volume, per thousand cubic feet (Mcf), to the new energy-content basis under the NGPA, per MMBtu. In the Commission's view, the NGPA's use of a Btu-based pricing scheme puts a premium on accurate Btu measurement that cannot be squared with the water-vapor assumptions of the Commission's longstanding wet rule. This is alleged to be so for two reasons. First, the Commission suggests, "Title I of the NGPA meticulously establishes a detailed pricing scheme for enumerated categories of natural gas," under which Congress could not have intended "to adopt a method of price calculation that leads to inaccurate results." Brief for Respondent FERC at 19, 20. Second, FERC adds, inaccurate measurement of the Btu content of natural gas would distort the intent of the NGPA to set ceiling prices for natural gas in reference to the Btu content of other fuels. *See id.* at 21 n.22. Neither of these two arguments withstands scrutiny.

There is no question but that the pricing scheme of the NGPA reflects the meticulous detail to which the Commission refers. But it is precisely the detail of this scheme that undermines the Commission's position. Originally introduced as the keystone of President Carter's National Energy Act, the NGPA emerged as a complex compromise between two radically different House- and Senate-passed bills. *Compare* H.R. 6831, 95th Cong., 1st Sess., 123 Cong. Rec. 13,184 (1977) (original bill in House) *and* S. 1469, 95th Cong., 1st Sess., 12 Cong. Rec. 13,730 (1977) (original bill in Senate) *with* H.R. 8444, 95th Cong., 1st Sess. (1977) (House-passed bill mandating permanent price controls on intra- and interstate sales) *and* S. 2104, 95th Cong., 1st Sess. (1977) (Senate-passed bill exempting intrastate sales from regulation and deregulating new onshore and offshore gas within two and five years, respectively). *See generally* Note, *Legislative History of the Natural Gas Policy Act: Title I*, 59 TEX. L. REV. 101, 106-16 (1980). The com-

promise bill combines price control and deregulation in a statutory scheme that creates nationwide incentive-based price ceilings for categories of gas at the margin of supply (such as "new," "high-cost," and "stripper well" gas); that retains various "just and reasonable" rates as the basis for price ceilings on "old" gas; and that imposes interim price controls on intrastate gas. Although the NGPA provides for phased deregulation of many of these categories of gas, Congress established the Act's interim, as well as permanent, price ceilings to the penny. The maximum lawful prices of various categories of gas are congressionally fixed in either specified dollar amounts or else in terms of their "just and reasonable" rates as of a date certain under the NGA. *Compare* 15 U.S.C. §§ 3312, 3313, 3317, 3318 (Supp. V 1981) (setting specific dollar amounts) *with id.* §§ 3314, 3316(a) (incorporating NGA "just and reasonable" rates). *See Public Service Commission of New York v. Mid-Louisiana Gas Company* (*Mid-Louisiana Gas*), 51 U.S.L.W. 5030, 5034 (U.S. June 28, 1983) ("Title I . . . establishes an exhaustive categorization of natural gas production and sets forth a methodology for calculating an appropriate ceiling price within each category"). Given that both the Commission and the producer-intervenors agree that the Btu content of natural gas is an integral part of each of the prices established in the NGPA, *see* Brief for Respondent FERC at 22 ("It cannot be denied . . . that the new statute expressly provides that heat content of natural gas determines its price"); Brief of Producer Intervenors at 16 (acknowledging that different methods of measuring Btu's can effectively raise or lower the NGPA's ceiling prices), it is most logical, for several reasons, to assume that Congress fixed these prices based on the "wet" method of measuring Btu's.

First, the wet rule establishes the only method of measuring Btu's with which Congress was likely to have been familiar. At the time Congress passed the NGPA,

the Btu content of natural gas had been defined by the Commission in terms of a standardized, saturated condition for over fifteen years. *See* discussion *supra* pp. 10-11. Moreover, the wet rule was the only method of measuring Btu's that was even tangentially acknowledged in the NGPA's legislative history. In the House committee report accompanying H.R. 8444, one of the NGPA's forerunner bills, the House Committee on Interstate and Foreign Commerce explained the bill's incorporation of "the just and reasonable price established by the Commission" by stating that "[t]he reference to . . . just and reasonable prices and contract prices for purposes of determining maximum lawful prices under section 405 *incorporates Btu adjustments and other quality adjustments provided for in FPC rate determinations* or in the applicable contract." H.R. REP. NO. 496, Part 4, 95th Cong., 1st Sess. 103 (1977) (emphasis added). Although the final version of the NGPA differed in many respects from H.R. 8444, the concept of incorporating the Commission's "just and reasonable" rates for certain categories of gas was carried over into the final version of the Act, *see, e.g.*, 15 U.S.C. §§ 3314, 3316(a) (Supp. V 1981). In explaining this incorporation, the House conference report referred to "the just and reasonable rates that were in effect on April 20, 1977 *as converted, if necessary, to a million Btu basis.* . . ." H.R. REP. NO. 1752, 95th Cong., 2d Sess. 82 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 8983, 8998 (emphasis added). We read the qualifier, "as converted, if necessary, to a million Btu basis," to assume that it would not be necessary to convert those contract prices established under the NGA that may already have been expressed on a "per million Btu" basis. *See, e.g., id.* at 85, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 9001 (referring to the NGA as setting the "just and reasonable" price of gas under interstate rollover contracts at *55¢/MMBtu's* for the second half of 1978.") (emphasis added). Given that such prices would have had to

comport with the NGA's longstanding wet rule, the report of the conference committee, like that of the committee report accompanying H.R. 8444, indicates at least indirect congressional incorporation of the wet rule into the NGPA's price structure. In contrast to this evidence of congressional familiarity with the pre-NGPA method of measuring Btu's, there is absolutely no evidence of congressional awareness of any alternative "dry" or "as delivered" methods. Under a statutory scheme in which Congress establishes definite prices for various categories of gas, and in which price adjustments for inflation and real growth are often expressed to the *thousandth's* place (*see supra* p. 23), the Commission's attribution to Congress of a price component with which it was wholly unfamiliar is unreasonable.

We reject the Commission's dry rule for a second reason: it severely overstates the significance of Congress' shift to the MMBtu basis of pricing natural gas and accordingly distorts the ceiling prices that Congress intended to establish. Throughout its Order explaining the statutory rationale for the dry rule, the Commission repeatedly emphasizes that, by choosing the "MMBtu" commodity unit in the NGPA, Congress necessarily rejected the NGA's use of the "Mcf" commodity unit and all that went with it—including the "wet method" of measuring Btu's for the purpose of making Btu quality adjustments in the price. *See, e.g.*, Order No. 93-A, *supra*, 32-33, 45-48. Such a sweeping conclusion is belied, however, by the NGPA's legislative history. Specifically, there is considerable evidence that Congress may have assumed the "Mcf" and "MMBtu" commodity units to be, in many respects, equivalent. We note, for example, that the ceiling price for "new" gas established in section 102 of the NGPA, $1.75 per MMBtu, tracks President Carter's originally submitted bill, which proposed that the price for "new" gas be set at $1.75 per Mcf. *Compare* 15 U.S.C. § 3312 (Supp. V 1981) *with White House Fact*

Sheet 16 (April 20, 1977), *reprinted in* I LEGISLATIVE HISTORY OF THE NATIONAL ENERGY ACTS OF 1978, Item 1 at 16 (1979). Similarly, the $0.54 per MMBtu price of interstate rollover gas established in 15 U.S.C. § 3316(a)(2)(A) (Supp. V 1981) appears to track exactly the $0.54 per Mcf price, for the same type and age of gas, derived from *Just and Reasonable National Rates for Sales of Natural Gas*, 52 F.P.C. 1604 (1974). And two of the NGPA's floor managers, Senator Jackson and Representative Dingell, both indicated their belief that the $1.45 per MMBtu price of section 109(b) derived directly from the $1.45 per Mcf price of identical gas established under the Commission's Opinion 770-A, *National Rates for Jurisdictional Sales of Natural Gas*, 56 F.P.C. 2698 (1976). *See* 124 Cong. Rec. H13,117 (daily ed. Oct. 14, 1978) (statement of Representative Dingell); 124 Cong. Rec. S15,020-21 (daily ed. Sept. 13, 1978) (statement of Senator Jackson). From this legislative history, we abstract only the likelihood that Congress may well have assumed that the "Mcf" and "MMBtu" bases of natural gas pricing were far more interchangeable than the Commission realized in its abandonment of the wet rule. Accordingly, we cannot accept the Commission's position that the NGPA's use of an "MMBtu" price represents so drastic a shift that all aspects of "Mcf" prices—such as the wet rule—were necessarily rejected. Such a position derives from assumptions at odds with those used by Congress in establishing the precise ceiling prices at issue in the case. *Cf. Mid-Louisiana Gas*, 51 U.S.L.W. at 5034 n.12 (although NGPA generally meant to displace Commission's regulatory *authority* under NGA, "[f]or some (but not all) old gas, the NGA price is preserved as an initial ceiling price"). Moreover, the Commission's position is difficult to reconcile with those sections of the NGPA authorizing the Commission to prescribe higher ceiling prices, in limited circumstances, provided that the new prices are "just and reasonable within the meaning of the Natural Gas Act." *See, e.g.*, 15 U.S.C. §§ 3314

(2), 3316(c), 3319(b) (Supp. V 1981). Given that the wet rule continues to govern the Commission's practice under the NGA, it would appear that only a "wet" method of measuring Btu's would satisfy both the NGPA's authorization to set higher just and reasonable rates "within the meaning of the NGA" and its requirement that all gas be priced on an MMBtu basis.

Our concern with the assumptions underlying the NGPA's pricing scheme provides the basis for a third criticism of the Commission's "dry" interpretation of the Act. Specifically, the Commission argues that Congress chose MMBtu's as its commodity unit in order to reference the price of natural gas to the "Btu equivalency" of other fuels. A "wet" method of measuring Btu's would unjustifiably skew this inter-fuel comparison, the Commission concludes, by distorting the Btu measurement of natural gas with artificial assumptions about water vapor content that do not, in fact, exist. *See* Order No. 93-A, *supra*, JA 45-46. The Commission's conclusion suffers from two major weaknesses. First, the final version of the NGPA failed to carry over the provisions of the House- and Senate-passed predecessor bills which adjusted the wellhead price for natural gas in light of the "current Btu-related price" of domestic crude oil. *Compare* 15 U.S.C. §§ 3311-3333 (Supp. V 1981) (final version of Title I) *with* H.R. 8444, 95th Cong., 1st Sess. § 403 (1977) *and* S. 2104, 95th Cong., 1st Sess. § 303 (1977) ("current Btu-related price" sections of NGPA's unenacted, predecessor bills). Given that the direct comparison between gas and oil Btu's was dropped from the final version of the statute, the Commission's emphasis on accurate inter-fuel comparisons loses much of its force. Second, moreover, the Commission's emphasis on hyper-accurate measurements finds little support from those inter-fuel Btu comparisons made in other statutory provisions enacted contemporaneously with Title I of the NGPA. Thus, for example, the committee report accom-

panying the Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat. 3174-3205 (1978), refers to several "standard" assumptions made in determining the Btu equivalency of oil and gas for tax purposes: "To arrive at a Btu equivalency price for each million BTU's of natural gas, the price per barrel is divided by 5.8 million. (A thousand cubic feet of natural gas equals about 1 million BTUs)." H.R. REP. No. 496, Part III, 95th Cong., 1st Sess. 97 (1977). The apparent willingness of Congress to use a standard conversion factor of 5.8 million Btu's per barrel, as well as its generalization that one thousand cubic feet of gas (1 Mcf) contains approximately one million Btu's (1 MMBtu), suggests that Congress was not necessarily adverse to the use of "standard" assumptions underlying the wet rule. Indeed, the Commission itself has endorsed the use of standard assumptions in its implementation of section 204(e) of Title II of the NGPA, 15 U.S.C. § 3344(e) (Supp. V 1981). Section 204(e) requires that the Commission determine the cost of alternative fuel (specifically, of Number 2 fuel oil) on an MMBtu basis. Yet, in its implementing regulations, the Commission adopted a standard conversion factor of 5.8 million Btu's per barrel of Number 2 fuel oil, and specifically *rejected* the suggestions of various commenters that the Commission adopt a specific adjustment factor to accommodate variations in the Btu content among different barrels of oil. *See* 44 Fed. Reg. 57,754, 57,770 (1979). To the extent that Congress' use of Btu's may be given effect by the use of various "standard" measurements in Title II of the NGPA and in the Energy Tax Act of 1978, there does not seem to be any necessary incompatibility between Congress' shift to MMBtu's in Title I of the NGPA and its use of the "standard" assumptions underlying the wet rule.

In sum, we find the Commission's dry rule to be inconsistent with the NGPA's language, structure, and legislative history. Although one of the purposes of the Act

was to increase the financial incentives for producing various types of new gas, *see* Note, *Legislative History of the Natural Gas Policy Act*, *supra*, p. 25, at 116, Congress did not intend for the Commission to raise the effective wellhead price of gas as much as possible. Rather, Congress itself specified the maximum lawful prices of most categories of gas and authorized the Commission to raise those prices only in certain, very limited, circumstances. *Cf. Pennzoil Co. v. FERC*, 645 F.2d 360, 379 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982) ("The balance Congress struck already took into account the conflicting interests of producers and consumers"). Given that the definition of Btu content is an integral part of the price structure chosen by Congress, *see supra* p. 26, the critical focus in this case involves the likely assumptions made by Congress in pricing natural gas on a "per MMBtu" basis. Thus, however more appealing the dry rule may be to the Commission's sense of scientific aesthetics and accuracy, it is not for the Commission to "improve" the statutory design chosen by Congress. The Commission's technical experience with measuring Btu's is of limited usefulness in determining what Congress meant in setting ceiling prices for natural gas on a Btu basis. Unlike those situations in which Congress delegates to an agency the choice of methodologies or definitions, *see, e.g.*, 29 U.S.C. § 880(b) (Supp. V 1981) (directing the Secretary of Labor "to develop reliable methods . . . to produce more statistically accurate data on unemployment"), the Commission itself concedes that it was given "no independent authority under the NGPA to define 'Btu,'" Brief for Respondent FERC at 28 n.28. Even according the Commission's rationale for the dry rule the respect traditionally due an agency's statutory interpretation, *see, e.g.*, *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981); *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977), we find the Commission's dry rule—whether characterized as legislative

or interpretative—to be fundamentally at odds with the Btu measurement technique implicit in the NGPA.

Because we find the dry rule "not in accordance with law," we need not reach the issues of whether the rule had been promulgated with sufficient notice and opportunity to comment; whether the rule had been improperly given retroactive effect; or whether the Commission failed to guarantee pipelines and distribution companies automatic pass through of any retroactive payments. The only issue remaining for disposition is the motion of the intervenors to dismiss one of the petitioners, Lone Star Gas Company, for failing to meet the jurisdictional prerequisites of section 506 of the NGPA, 15 U.S.C. § 3416(a)(2) (Supp. V 1981). Section 506 requires any person seeking judicial review of a Commission order to have petitioned the Commission for rehearing within thirty days of the issuance of the order. *See Ecee, Inc. v. FERC*, 611 F.2d 554, 559-66 (5th Cir. 1980) (applying this requirement to persons seeking judicial review of agency rulemaking). It is undisputed that Lone Star did not file for rehearing of the Commission's Order 93, in which the Commission's dry rule was first announced, but did file within thirty days of the Commission's explanatory order, Order 93-A. Although we do not require persons to read vague agency rules with the clairvoyance of "the most tireless of advocates," *Sam Rayburn Dam Electric Co. v. FPC*, 515 F.2d 998, 1117 n.35 (D.C. Cir. 1975), the fact that all of the other petitioners in this action found Order 93 sufficiently clear to trigger petitions for agency reconsideration convinces us that the Order was not so ambiguous as to excuse Lone Star from the NGPA's filing provision. Accordingly, we dismiss Lone Star for failing to meet the jurisdictional requirements of the Act. Because all of the arguments advanced by Lone Star before this court are also advanced by several of the other petitioners, however, our dismissal of

Lone Star does not affect the issues presented in this case.

For the reasons discussed above, the Commission's measurement of Btu content established in section 270.204 of its rules of practice must be vacated.

It is so ordered.

APPENDIX B

DC-C-37

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Charles B. Curtis, Chairman; Georgiana Sheldon, Matthew Holden, Jr., and George R. Hall.

Docket No. RM80-33

FINAL RULES FOR)
PART 270, SUBPART B,)
SECTIONS 270.201,)
270.202 AND 270.204)

ORDER NO. 93

FINAL RULE

(Issued July 16, 1980)

On December 1, 1978, the Federal Energy Regulatory Commission (Commission) issued interim regulations (43 *Fed. Reg.* 56448, December 1, 1978) implementing certain sections of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3301-3432, including Subpart B of Part 270 which prescribes special rules relating to first sales of natural gas. On January 18, 1980, the Commission amended the interim rules in Subpart B to include provisions for percentage-of-proceeds sales. (Order No. 68, issued in Docket No. RM80-14, 45 *Fed. Reg.* 5678, January 24, 1980.)

This final rule addresses the following sections of Subpart B of Part 270: § 270.201, which deals with first sales of commingled gas; § 270.202, which prescribes rules for resellers of natural gas; and § 270.204, which describes a standard method of determining the Btu con-

tent per unit volume of gas sold under the NGPA. The rule addresses comments concerning the December 1 interim rules as well as requests for clarification of Order No. 68 as it relates to percentage-of-proceeds sales. The remaining portions of Subpart B (§§ 270.203, 270.205, and 270.206) have been addressed in separate rulemakings and will not be considered here.

* * * *

D. *Section 270.204.*

Section 270.204 describes a standard method for determining Btu content per unit volume of natural gas. Btu content must be measured for much of the gas sold under the NGPA because the Act requires that first sales not exceed certain maximum lawful prices, which are stated in terms of MMBtu's.[10] Furthermore, any seller whose gas is subject to section 105 may need to know the Btu content of the gas in order to determine whether he is subject to the maximum lawful price in section 105(b)(1) or that in section 105(b)(2).[11]

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[10] Maximum lawful prices for "minimum rate gas," *see* § 271.101(a), and maximum lawful prices for certain sales under sections 105 and 106(b) are expressed on an Mcf, and not an MMBtu, basis. *See* note 6 *infra*.

[11] For example, where gas is subject to section 105 (existing intrastate contracts), it will be necessary to know the Btu content in some but not all cases. Initially, a Btu content test may be necessary in order to determine whether the sale is subject to section 105(b)(1) or section 105(b)(2). If the price under the terms of the existing contract is calculated on a volumetric basis (per Mcf) and is clearly lower than the maximum lawful price per MMBtu under section 102 on November 9, 1978, the price per Mcf under the terms of the existing contract is the maximum lawful price. There is no need to measure the heat (Btu) content of the gas. However, if the price under the existing contract appears to be close to the section 102 maximum lawful price, it becomes necessary to ascertain the Btu content of the gas in order to determine whether or not the contract price exceeds the new gas ceiling price determined as of the date of enactment. For similar reasons, a Btu content test may be necessary for sales subject to section

One comment on this section asked at what site Btu content should be measured for purposes of billing. If a well produces from several completion locations and the various streams are subject to different maximum lawful prices, Btu content should be determined for each stream subject to a different maximum lawful price. The Commission will accept any method for Btu measurement that is reasonably designed to determine the Btu content of each such stream.

One comment asked whether Btu content tests are required when gas is sold pursuant to "casinghead gas contracts which are of the percentage type." The comment argued that the exigencies of such arrangements make it impractical to perform Btu content tests on a well-by-well basis, *i.e.*, prior to commingling in a central separator serving a number of wells. As noted above, the Commission will accept any measurement method reasonably designed to ascertain Btu content. In this case, the reseller may use any estimation method reasonably designed to measure Btu content if it is impractical to measure Btu content prior to commingling.

Several comments noted that § 270.204 provides that Btu content must be measured on a "saturated with water vapor" basis rather than on the basis of the actual water vapor content of the gas as delivered. The comments asserted that under this rule the seller would be paid for less Btu's than would actually be delivered if the gas were sold on a dry (unsaturated) basis.

This assertion is erroneous. Section 270.204 merely describes the test standard for expressing the number of Btu's contained in a cubic foot of gas under certain conditions. Under this standard, the heat value is expressed

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105(b)(1) if and when the contract price escalates under the contract terms to an amount close to the section 102 maximum lawful price. (Of course, the heat content of the gas must be measured if the sale is subject to section 105(b)(2)). *See* section 105(b).

as the number of Btu's per cubic foot of gas "saturated with water vapor." The Commission is aware that the water vapor content or pressure of the gas when tested may be different than described in this standard, and may also be different than the conditions that obtain when the gas is delivered. Therefore, the results obtained under test conditions, be they those in the rule or others, must be converted to figures that reflect the actual condition of the gas on delivery in order to properly price the gas.

A few commenters asked what is the correct pressure base for measuring Btu content per unit volume of natural gas.

Section 270.204 uses a standard pressure base of 30 inches of mercury at 32 degrees Fahrenheit to determine what constitutes a cubic foot of gas and to determine how many Btu's are in that cubic foot of gas. These comments noted correctly that the pressure base of 30 inches of mercury at 32 degrees Fahrenheit for expressing Btu content per unit volume of natural gas does not convert precisely to 14.73 pounds per square inch (p.s.i.), the pressure base used in section 2(29) of the NGPA to define a standard Mcf (1,000 cubic feet) of natural gas. We note that measurement of the Btu content of natural gas can be made at any desired pressure base, provided that the measurement is accurate and provided that the measurements for Btu content and for volume are converted to a common pressure base.[12]

Another comment asked that the Commission provide a list of the acceptable methods of measuring Btu content, *e.g.*, chromatograph, calorimeter, etc. The Commission believes at this time that the method of measure-

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[12] The comments stated that traditionally intrastate pipelines use a pressure base of 14.735 p.s.i., while interstate pipelines use a pressure base of 14.73 p.s.i. As stated above, either pressure base may be used as long as the correct number of Btu's sold is known.

ment may best be determined by the parties to the sales contract. We will accept any reasonable method for determining Btu content upon which the parties agree. We note, however, that contractual obligations should be observed and that appropriate conversion factors should be applied in order to modify test results to actual delivery conditions of the gas.

III. PUBLIC PROCEDURES AND EFFECTIVE DATE

The regulations in Subpart B of Part 270 (except for those interim rules promulgated in Order No. 68) were originally proposed for comment in November of 1978 in Docket No. RM79-3 and issued as interim regulations on December 1, 1978 (43 *Fed. Reg.* 56448, December 1, 1978). For 60 days thereafter comments were received, and during that period hearings were held on these regulations. By this process the Commission complied with 5 U.S.C. § 553 and with section 502(b) of the NGPA, which requires that, "[t]o the maximum extent practicable," an opportunity for the oral presentation of data, views and arguments be afforded for certain regulations under the NGPA. The amendments contained in this order rest upon consideration given to the information received during the above-described notice, comment, and hearing process. The Commission finds that further notice and public procedure with respect to §§ 270.201, 270.202 and 270.204 is unnecessary.

Paragraphs (e)(3) and (h) of the interim rules were originally issued in Docket No. RM80-14 (Order No. 68) as amendments to the interim rules in Part 270. The clarifications to those paragraphs, which are being issued here as final rules, respond to petitions for clarification of those paragraphs filed in Docket No. RM80-14.

Sections §§ 270.202 and 270.204 are being issued as final regulations, effective (30 days from date of issuance). Section 270.201 is revoked retroactive to December 1, 1978. However, no first seller will be subject to a

refund obligation, or enforcement action, for having charged and collected any rate in reliance on that section for deliveries which occurred before September 1, 1980.

(Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432; Natural Gas Act, as amended, 15 U.S.C. 717, *et seq.*; Department of Energy Organization Act, 42 U.S.C. §§ 7107-7352; E. O. 12009, 42 *Fed. Reg.* 46267.)

In consideration of the foregoing, §§ 270.201, 270.202, and 270.204 of Part 270, Subchapter H, Chapter I, Title 18, Code of Federal Regulations, issued as interim regulations (43 *Fed. Reg.* 56448, December 1, 1978 and 45 *Fed. Reg.* 5678, January 24, 1980) are promulgated as final regulations and are amended as set forth below, effective as set forth above.

By the Commission.

[SEAL]

/s/ Kenneth F. Plumb
KENNETH F. PLUMB,
Secretary.

* * * *

3. Interim regulation § 270.204 is adopted as a final regulation.

§ 270.204 *Btu content per cubic foot of natural gas.*

(a) *Measurement.* The Btu content of one cubic foot of natural gas under the standard conditions specified in paragraph (b) of this section is the number of Btu's produced by the complete combustion of such cubic foot of gas, at constant pressure with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of the gas and air and when the water formed by such combustion is condensed to a liquid state.

(b) *Standard conditions.* The standard conditions for purposes of paragraph (a) of this section are as follows: The gas is saturated with water vapor at 60 degrees Fahrenheit under a pressure equivalent to that of 30.00 inches of mercury at 32 degrees Fahrenheit, under standard gravitational force (980.665 centimeters per second squared).

4. The table of contents of Subpart B of Part 270 is amended by deleting "First sale of natural gas subject to differing maximum lawful prices" and by inserting in lieu thereof "[Reserved]."

DC-C-1

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Georgiana Sheldon, Acting Chairman; Matthew Holden, Jr., George R. Hall and J. David Hughes.

Docket No. RM80-33

FINAL RULES FOR)
PART 270, SUBPART B,)
SECTIONS 270.201,)
270.202 AND 270.204)

ORDER NO. 93-A

ORDER DENYING REHEARING AND CLARIFYING ORDER NO. 93

(Issued April 24, 1981)

On July 16, 1980, the Commission issued final regulations in Order No. 93 (45 Fed. Reg. 49077, July 23, 1980) which amended the Commission's interim rules relating to first sales of natural gas that are resales and the standard for determining the Btu content of natural gas. Eight timely applications for rehearing were filed.[1] Two petitioners also requested a partial stay of the order.

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[1] Michigan Wisconsin Pipe Line Company (also requested clarification); El Paso Natural Gas Company (also requested a partial postponement); Transcontinental Gas Pipe Line Corporation (Transco) (also requested clarification); United Gas Pipe Line Company; Texas Gas Transmission Corporation; Interstate Natural Gas Association of America (INGAA) (also requested clarification); Natural Gas Pipeline Company of America (Natural) (also requested reconsideration and a partial stay); and Consolidated Gas Supply Corporation.

Subsequently, two requests for clarification [2] and two applications for stay [3] were filed.

On September 15, 1980, the Commission granted rehearing of Order No. 93 solely for purposes of further consideration but denied the two petitions for partial stay of Order No. 93. On October 15, 1980, Natural filed an application for rehearing of the Commission's denial of its petition for a partial stay. On November 14, 1980, the Commission granted rehearing on that application solely for purposes of further consideration.

None of the filings contested or raised issues concerning the regulations regarding resales; all addressed the final rule in § 270.204 which clarified the interim rule describing a standard for determining the Btu content of natural gas. This order on rehearing denies all applications for rehearing or reconsideration of Order No. 93 as well as the two additional petitions for stay; however, it grants requests for clarification of Order No. 93 and the final rule in § 270.204.

This order, like Order No. 93, authorizes natural gas subject to a first sale to be priced based on the number of MMBtu's actually delivered, to the extent such pricing is contractually permissible. The order also makes clear that the Commission will not require continuous monitoring and recording of heating value (MMBtu's) but will accept any reasonable, unbiased method acceptable to the industry and the contracting parties for periodically measuring gas composition, gas heating value or other variables in order to determine the number of MMBtu's actually delivered in a first sale. Pipelines subject to the jurisdiction of the Commission will be permitted the opportunity to demonstrate in their next PGA filing the

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[2] Tennessee Gas Pipeline Company and Valero Transmission Company. (Valero also requested reconsideration.)

[3] Arkansas Louisiana Gas Company (Arkla) and Transco.

appropriateness of rate treatment for any claimed retroactive payments occasioned as a result of the Btu Rule controversy.

I. *Background*

In Title I of the NGPA, Congress prescribed "ceiling prices" for first sales of natural gas. It did so by establishing maximum lawful prices "per MMBtu" (i.e. Million British Thermal Units) for various categories of natural gas. The "ceiling price" chargeable for a first sale was to be determined by multiplying the applicable maximum lawful price per MMBtu by the number of MMBtu's subject to the first sale.

In Order No. 93 the Commission promulgated § 270.204 as a final rule. The rule itself merely describes the standard conditions under which the number of MMBtu's in a volume of natural gas is measured.[4] However, recognizing that actual delivery conditions vary widely and are most often different from the defined standard conditions, the Commission noted in the preamble to Order No. 93 that the results of Btu measurements at the defined standard conditions must be adjusted to account for actual delivery conditions before determining the "ceiling price" that can be charged for the sale under the NGPA (i.e., the maximum lawful price per MMBtu multiplied by the number of MMBtu's actually delivered).[5] This

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[4] The essential parameters of the "standard conditions" are that the gas is at a temperature of 60°F, under a pressure of 30 inches of mercury (approximately 14.73 pounds per square inch), and, at these defined temperature and pressure conditions, the gas is saturated with water vapor. (*See* note 21, *infra*, for full definition.) At these defined temperature and pressure conditions, natural gas will contain approximately 820 pounds of water vapor per million cubic feet of total gas. (*See* Appendix I, "Variance in Water Vapor Content and Heating Value.")

[5] As a practical matter, the determination would most often be made by measuring the gas on a volumetric basis at delivery

statement was predicated on the Commission's belief that, for purposes of determining the NGPA "ceiling price," the number of MMBtu's subject to a first sale is the number of MMBtu's actually delivered to the purchaser.

The petitions for rehearing raised several arguments concerning the Commission's statement in the preamble to Order No. 93 that "the results obtained under test conditions, be they those in the rule or others, must be converted to figures that reflect the actual condition of the gas on delivery in order to properly price the gas." [6] Three petitioners alleged that under Order No. 93 the maximum lawful prices for sections 104, 106(a) and 109 would exceed those prescribed under Title I of the NGPA because, under the Natural Gas Act (NGA), the Btu adjustment to the volumetric base price was based on the prevailing industry practice of determining Btu content at standard conditions and permitted no conversion to reflect the number of MMBtu's actually delivered. A fourth petitioner argued that Congress had adopted this prevailing industry practice for all Title I categories of natural gas and that Order No. 93 thus violated all of the NGPA "ceiling prices."

Several petitioners, conceding for purposes of discussion that Order No. 93 did not violate Title I "ceiling prices," questioned the effect of the Commission's statement on specific contractual provisions under which the number of MMBtu's to be attributed to an Mcf of natural gas for pricing purposes is to be based on the results of Btu measurement at the standard conditions. They indicated that the language in Order No. 93 was ambiguous but that an interpretation that nullified such contractual provisions would violate section 101(b)(9) of the NGPA

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conditions, multiplying the number of Mcf's so measured times the number of MMBtu's in an Mcf of the gas at delivery conditions, and multiplying the results by the applicable maximum lawful price.

[6] 45 Fed. Reg. 49077, 49080.

which states that the Title I maximum lawful prices do not nullify or supersede the contract price. Should the contract price depend on the number of MMBtu's actually delivered, they asked what monitoring procedures would be required by the Commission in order to determine the Btu content of the natural gas at delivery conditions.

Two petitioners alleged that the clarifications in the final rule and the explanatory language in the preamble of Order No. 93 sufficiently altered the interim rule in § 270.204 so as to violate the notice and comment provisions of the Administrative Procedure Act (APA) and argued that the final rule should have prospective effect only.[7] In the alternative, these and other petitioners sought a one-time PGA filing to pass through the increase in prices that they alleged would result were the Commission to retain its position on the Btu issue on rehearing.

We have addressed each of these issues in this order.

II. *Lawfulness of "Ceiling Prices" Under Order No. 93*

A. *Petitioners' Argument*

The maximum lawful prices published for sections 104 and 106(a) are referenced to the just and reasonable rates that applied to various categories of natural gas under the NGA on April 20, 1977. These rates consisted of a base price per Mcf which was to be adjusted to the extent the gas did or did not contain heating value equal to one MMBtu per Mcf. Although the dollar amount chargeable for a sale of natural gas under the NGA depended on the number of Mcf's actually delivered, the

[7] The Commission stated in Order No. 93 that the amendments to the interim rule were of a clarifying nature. Therefore, contrary to one petitioner's allegation, their effective date is not September 22, 1980, (the effective date of Order No. 93) but December 1, 1978, the effective date of the interim rule. *Id.* at 49078.

heating value adjustment was based on Btu measurements made at standard conditions and permitted no conversion to actual delivery conditions. Measurement at standard conditions usually understates the number of MMBtu's actually delivered to the purchaser. (See Appendix I for more detailed discussion.)

Although sections 104 and 106(a) reference the NGA just and reasonable rates, which were stated on a *per Mcf* basis, the maximum lawful prices for those sections are stated on a *per MMBtu* basis. The Commission's adoption of the per-Mcf base price as the maximum lawful price, when coupled with the requirement under the Btu rule that the maximum lawful price be applied to every MMBtu actually delivered, for purposes of determining the NGPA "ceiling price," has resulted in "ceiling prices" that are higher than some purchasers claim would have been applicable under the NGA (ignoring the differences in inflation adjustments between the NGA and NGPA pricing schemes).

The petitioners argued that, except for the variation in inflation adjustments under the NGA and the NGPA, Congress intended to maintain producer revenue levels extant under the NGA. Noting that the Commission's current regulations confound this alleged purpose, they contended that the Commission must either rescind its statements in Order No. 93, regarding conversion of heat content findings at standard conditions to findings that would obtain at actual delivery conditions, or lower its published maximum lawful prices for sections 104 and 106(a) to counteract the inflationary effect of the language in Order No. 93.[8]

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[8] One petitioner limited this argument to sections 104 and 106(a). Two others extended it to section 109 based on statements in the legislative history that the section 109 price is intended to be the same as the section 104 price. The fourth petitioner alleged, based on the statements concerning sections 104 and 109 and the need to interpret the phrase "per MMBtu" consistently, that the argument pertains to all Title I pricing categories.

The petitioners argued, in effect, that the phrase "per MMBtu" in the NGPA merely establishes the commodity unit to be measured, not "how" or "when" such measurement is to be made. They argued that the prior practice of pricing based on the results of Btu measurements at standard conditions survives and is incorporated into the NGPA because the statute contains no clear intent to abrogate that practice. Several petitioners supported their argument by referring to section by section analyses by Representative Dingell and Senator Jackson in the legislative history[9] and alleging that these statements indi-

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[9] *Statement by Senator Jackson*:

> The maximum lawful price computed in accordance with subsection 104(b) is the same as the maximum lawful price computed in accordance with subsection 109(b). The base rate used in both computations is subject to an inflation adjustment. In other words, the just and reasonable rates set by the Federal Power Commission and in effect, as of April, 1977 are frozen as of that date and the inflation adjustment provided under this Act is to be added from that date forward. For example, the new gas rate set in FPC Opinion No. 770-A, applicable to certain eligible producers was $1.45 in April, 1977.
>
> Thus, $1.45 would be the base rate applicable to certain eligible producers subject to section 104 and for all gas subject to section 109. The conferees do not intend to allow both the escalators of 1 cent each calendar quarter provided by Opinion No. 770-A, and the inflation adjustment provided by this Act to operate. Only the inflation adjustment provided by this Act will be allowed to operate after April, 1977. 124 Cong. Rec. S 15020-21 (Sept. 13, 1978).

Statement by Congresseman Dingell:

> Section 104 establishes the ceiling price mechanism applicable to natural gas dedicated to interstate commerce prior to enactment of the bill and for which a just and reasonable rate had been established under the Natural Gas Act. The applicable just and reasonable rate in effect in April, 1977 is referenced as the base price to which the inflation adjustment factor is applied to yield the maximum lawful price in any future month.
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> The just and reasonable rate under FPC Opinion 770-A applicable to wells spudded on or after January 1, 1975, in-

cate Congressional intent to maintain producer revenues for NGA gas at pre-NGPA levels.

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cludes a $.01 escalator each calendar quarter. Moreover, technically speaking, Opinion 770-A establishes a just and reasonable rate of $1.62 per Mcf for this vintage. The $1.42 per Mcf price most commonly referred to is merely the base rate allowed under the decision discounted to its then present value. The $.01 per quarter escalator is designed to yield an average $1.62 per Mcf rate over the projected life of the average reservoir.

Accordingly, a question has arisen whether the just and reasonable rate referenced in section 104(b)(1)(A)(i) is to include the $.01 quarterly adjustment in the inflation adjustment under section 104(b)(1)(A)(ii). The answer is an emphatic NO. The conferees did not intend a double dip. The "just and reasonable rate * * * applicable * * * on April 20, 1977" is intended to incorporate by reference the $1.45 per Mcf price permitted in April 1977. This price is to be adjusted thereafter only pursuant to the inflation adjustment provided in section 104(b)(1)(A)(ii). (Moreover, lest there be any doubt, the conferees did not intend the reference to be to the $1.62 price either.) That the conferees intended to reference the $1.45 per Mcf price is supported by the construction of section 109, wherein the $1.45 price is set forth. Section 104 deals with area rates, national rates of several vintages, and special relief pricing. Therefore it was not possible or practical to specify each rate. Incorporation by reference was required. In the case of section 109, a specific rate was possible and the rate selected was the just and reasonable rate under Opinion 770-A applicable on April 20, 1977, i.e., $1.45 per Mcf. This assured that these sections would be consistent with one another. A question has arisen respecting the pricing of interstate gas, presently subject to contract, including a warranty contract, at a price lower than the just and reasonable rate presently applicable to the gas, following expiration of that contract. As the preceding paragraphs indicate, sections 104 and 106 would be applicable. Under section 101(b)(5), the section yielding the higher price would establish the maximum lawful price. If a contract is being satisfied with gas produced from wells of a vintage for which a higher just and reasonable rate has been established by the Commission that just and reasonable rate is referenced as the basis for the maximum lawful price under section 104. Moreover, once the existing contract no longer limits the price (see section 101(b)(9)), the producer could

B. *Summary of Commission Decision*

In developing a comprehensive wellhead pricing system for interstate and intrastate sales of natural gas, Congress had to coordinate the previous NGA pricing system with the system of incentive prices it had established under the NGPA for the purpose of encouraging production of domestic supplies of natural gas. It decided that coordination of these two pricing systems required uniformity with respect to the commodity priced (volumes versus heating value) as well as the methodology for adjusting the maximum lawful prices based on inflation.

The latter objective required that Congress abolish the quarterly escalator that had applied under the NGA pricing scheme and replace it with the monthly inflation adjustment applicable to the incentive pricing categories. This is the issue addressed by both Congressman Dingell and Senator Jackson in those portions of the legislative history cited by the petitioners.

Congress also elected to impose uniformity with respect to the commodity to be priced and chose to establish energy-referenced prices (dollars per MMBtu) as opposed to volume-referenced prices (dollars per Mcf). This choice was inherent in the Congressional intent to establish incentive prices based on the commodity value of alternative energy sources. Thus the maximum lawful prices for those sections of Title I that reference the NGA just and reasonable per-Mcf rates (as well as section 109) were also stated on a "per MMBtu" basis.

However, Congress left implementation of energy-referenced pricing for these sections to the Commission. Recognizing that a problem might exist in converting

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charge and the purchaser could pay any amount up to the maximum lawful price which, under both sections 104 and 106, would be based upon the just and reasonable rate which but for enactment of this legislation, would have been applicable. 124 Cong. Rec. H 13117 (Oct. 14, 1978).

NGA just and reasonable rates to NGPA maximum lawful prices, the Statement of Managers adverted to that problem without resolving it by merely referencing the "just and reasonable rates that were in effect on April 20, 1977, as *converted, if necessary* to a million Btu basis. . . ." (Emphasis added).[10] Thus, it was left to the Commission to resolve the conversion issue.

That Congress imposed this responsibility upon the Commision was entirely predictable because coordination of the NGA and the NGPA required the expertise of that agency familiar with the structure and intricacies of the prior NGA pricing scheme.[11] In discharging this responsibility, the Commission had to examine that NGA pricing scheme and establish a rational way to coordinate it with the NGPA. Had there been a direct correlation between the NGA's just and reasonable rates per Mcf and the NGPA's system of maximum lawful prices, which are stated on a "per MMBtu" basis, the Commission's task would have been a simple one. However, no such direct correlation exists. Thus the Commission was left with two inquiries. How should the number of MMBtu's upon which the NGPA "ceiling price" is based be determined: at standard conditions, *i.e.* in the same manner as Btu content had been determined under the NGA for purposes of quality control, or at actual delivery conditions? And, what should the maximum lawful price per MMBtu be for such gas?

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[10] Joint Statement of Managers, H. Rep. No. 95-1752, 95 Cong., 2d Sess. 82 (1978).

[11] The Congressmen's references in the legislative history to the specific Opinion 770-A rate for post-1974 wells (Opinion 770-A rate), upon which the maximum lawful prices for section 109 and one subcategory of section 104 are based, are inconsistent and confusing and suggest that neither Congressman was familiar with such intracacies of the regulatory scheme as the interface between volume-referenced pricing and the Btu adjustment procedure.

With respect to the Btu measurement issue, the Commission determined that the number of MMBtu's accounted for in establishing the "ceiling price" for a first sale of section 104, 106(a) and 109 gas should be the number of MMBtu's actually delivered. We made this decision based on examination of the commodity pricing concepts embodied in the NGPA and the NGA. In the NGPA's incentive pricing categories, heating value is priced on an *as-delivered* basis.[12] Although the commodity priced was volume rather than heating value, the NGA, too, priced the commodity on an as-delivered basis. Therefore, the Commission decided that consistency within the NGPA and continuity with the NGA required that conversion be accomplished so as to preserve the as-delivered pricing concept for sections whose maximum lawful prices are referenced to the NGA just and reasonable rates. (See Section II C for more detailed analysis.)

With respect to the maximum lawful prices for these sections, we did not think it clear from examination of the NGPA and its legislative history that Congress' purpose was to maintain producer revenue levels for NGA gas at pre-NGPA levels.[13] Certainly the language of the statute itself manifests no such intent. Indeed, Congress had implicitly abandoned any goal of maintaining pre-NGPA revenue levels in favor of uniformity when it imposed the same inflation adjustment for NGA-referenced and incentive pricing categories. Had Congress preserved the escalation provisions in Opinion 770-A, the maximum lawful price for April, 1981, for that subcategory of section 104 gas referenced to the rate for post-1974 wells in Opinion 770-A (Opinion 770-A rate) would have been

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[12] *See* discussion *infra*.

[13] Examination of the cited portions of the legislative history suggests that neither Congressman was aware of the Btu conversion issue and that both were addressing themselves to the "double dip" issue relating to escalations of the Opinion 770-A rate. *See* note 11, *supra*.

$1.61 per MMBtu instead of the $2.011 per MMBtu price that results from substitution of the NGPA monthly inflation adjustment methodology. Comparison of these two prices undermines the petitioners' theory that Congress intended that the NGPA maintain NGA producer revenue levels.[14]

Based on the absence of a direct correlation between the NGPA and NGA pricing schemes, the major alteration in producer revenue levels that Congress itself accomplished by changing the escalation factors for NGA-referenced gas, and the lack of any clear evidence in either the NGPA or its legislative history as to what result Congress would have reached had it resolved the Btu conversion issue itself, we decided to adopt a per-MMBtu maximum lawful price of $1.45 for Opinion 770-A rate gas subject to section 104. By adopting what were essentially the base prices as of April 20, 1977, for section 104 (and section 106(a)), we adapted the NGA's cost-revenue balancing scheme to prices stated on a "per MMBtu delivered" basis in order to promote maximum continuity between the NGA and the NGPA and maintain internal consistency within the Title I pricing scheme. With respect to the latter objective, we note that adoption of the $1.45 base price effects the Congress' intent that the maximum lawful price for the Opinion 770-A subcategory of section 104 be the same as that imposed by Congress for section 109. (*See* discussion in Section II D and Appendix I, "Compatibility of NGA and NGPA Prices.")

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[14] Although the petitioners acknowledged that a change in revenue levels resulted from Congress' replacing the NGA escalation methodology, they argued that Congress intended that no *additional* increases be effected by the Commission. However, the logic and persuasiveness of their argument are seriously impaired when the purported 2% increase in producer revenue levels effected by Order No. 93 is compared to the substantial 39% increase in the maximum lawful price implemented by Congress itself. (Had Congress not changed the NGA quarterly escalator, the increase in the maximum lawful price would have been 11 percent, rather than 39 percent.)

C. *The Measurement Issue*

Like the NGA, the NGPA establishes pricing guidelines for sales of natural gas. The commodity priced under NGA regulations was *volume* units (Mcf's) of natural gas delivered. However, one of the purposes for enacting the NGPA was encouragement of domestic production of natural gas. Congress viewed energy sources as fungible and attempted to encourage domestic production of natural gas by pricing it based on its comparable energy value with respect to alternative fuel sources. In order to encourage certain new production it set a maximum lawful price for section 102 equivalent to the average commodity value of the refiner acquisition cost of domestically produced oil.[15]

Because of a very clear physical difference between natural gas and other fuels, true comparison can only be achieved by applying the prescribed maximum lawful price to the number of MMBtu's in a volume of gas at delivery conditions rather than to some theoretical quantity such as the number of MMBtu's at standard conditions. This is true because, unlike other fuels, which are either liquid or solid as opposed to gaseous, water vapor in natural gas displaces hydrocarbon compounds, resulting in a diminution of the heating value of the natural gas. Measurement at standard conditions understates the heating value of the gas at delivery conditions.[16] Therefore, it is essential that the "ceiling price" be based on the actual heating value of the gas, *i.e.* the number of MMBtu's actually delivered, in order to achieve the Congressional purpose of pricing natural gas by comparison to the heating value of the selected alternative fuel.

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[15] H. Rep. No. 95-1752 at 67 and 68.

[16] The amount of water vapor contained in natural gas at the standard temperature and pressure conditions greatly exceeds the amount of water vapor that can be contained in natural gas at most pressure and temperature delivery conditions. (*See* note 4, *supra*, and graph in Appendix I.)

Like incentive pricing categories such as section 102, the maximum lawful prices for sections 104, 106(a) and 109 are stated on a "per MMBtu" basis. Although the difference in pricing mechanisms between section 102 and sections 104 and 106(a) make their direct comparison more difficult for purposes of interpreting the phrase "per MMBtu," (sections 104 and 106(a) reference prices extrinsic to the statute itself, while section 102 states a specific monetary amount), direct comparison of the pricing mechanisms in sections 102 and 109 is fairly straightforward because the structure of section 109 is identical to that of section 102, save for the differences in the stated monetary amount. This identity suggests that the "ceiling price" for section 109 should also be based on the number of MMBtu's actually delivered.

Although it is not essential that identical provisions in a statute be interpreted consistently, there must be some compelling reason to do otherwise. None exists here. The legislative history indicates clearly that the maximum lawful price for section 109 is the same as the maximum lawful price for the subcategory of section 104 gas that is referenced to the Opinion 770-A rate. However, contrary to the petitioners' arguments, the legislative history provides no conclusive evidence as to what that section 104 rate should be when converted to a "per MMBtu" basis. Thus it fails to provide a compelling basis for disparate interpretations of the phrase "per MMBtu" in sections 102 and 109 such that the number of MMBtu's subject to a first sale of section 102 gas would be accounted for differently from the number of MMBtu's subject to a first sale of section 109 gas.

What the legislative history does provide, given identical interpretations of the phrase "per MMBtu" for sections 102 and 109 and the Congressmen's comments in the legislative history concerning the identity of the maximum lawful prices in section 109 and the Opinion 770-A subcategory of section 104, is a basis for interpreting the

phrase "per MMBtu" in section 104 consistently with its interpretation in sections 102 and 109, i.e., as a requirement that the "ceiling prices" for section 104 (and, by implication, section 106(a)) be based on the heating value of the gas at actual delivery conditions.

Requiring that the "ceiling price" for first sales of section 104, 106(a) and 109 gas be based on the number of MMBtu's actually delivered also promotes continuity with the NGA by preserving the per-unit-delivered commodity pricing concept employed with respect to volume units under the NGA.

For these reasons, the Commission has decided to retain its original position that the NGPA "ceiling price" is dependent upon the number of MMBtu's actually delivered rather than the number of MMBtu's measured at standard conditions.

D. *The Maximum Lawful Price Issue*

Convinced that the commodity unit priced under the NGPA is an MMBtu and that the NGPA "ceiling prices" are to be determined on an as-delivered basis, the Commission was next required to explore the suggestion made by some petitioners that the NGA's $1.45 per Mcf base price on April 20, 1977 be reduced to $1.42 in order to maintain pre-NGPA producer revenue levels for that subcategory of section 104 gas that was previously priced at the Opinion 770-A rate and the further suggestion that all other NGA-referenced rates be similarly reduced.

There is no technical theory that compels adoption of lower maximum lawful prices such as $1.42 because there is no direct correlation between the NGA and NGPA pricing schemes. Furthermore, as we have already indicated, neither the statutory language nor the legislative history provides any clear indication of what result Congress would have reached had it resolved the conversion problem itself. Faced with the responsibility of coordi-

nating the disparite pricing schemes imposed under the NGA and the NGPA, the Commission decided to resolve the conversion issue by pursuing a policy of preserving internal consistency within the Title I pricing scheme and ensuring maximum conceptual continuity between the NGPA's per-MMBtu-delivered pricing scheme and the cost-revenue balancing methodology under which the NGA's per-Mcf base prices were originally established. For the reasons stated below, that policy is best promoted by adopting the base prices for the various categories of NGA gas as the maximum lawful prices for sections 104 and 106(a). We find support for this result by noting that Congress intended identity of pricing for section 109 and the Opinion 770-A subcategory of section 104 and that adoption of the $1.45 base price will impose the same maximum lawful price for that subcategory of section 104 as the maximum lawful price Congress *stated* in section 109.

As has been previously noted, the just and reasonable producer rates to which the maximum lawful price in sectons 104 and 106(a) are referenced were not established on a "per MMBtu delivered" basis. Instead, they were based on the number of Mcf's delivered and included a Btu quality adjustment determined by the number of MMBtu's measured at standard conditions. Because the NGA pricing scheme was inconsistent with respect to the methodologies for establishing volume as opposed to Btu content, no direct correlation exists between the NGA just and reasonable rates, in which heating value was an arbitrarily-derived numerical factor used to make a quality adjustment to the volume-referenced price, and the NGPA energy-referenced "ceiling prices" in which heating value is the price determinant.

Although it is mathematically possible to convert the Opinion 770-A rate of $1.45 per Mcf to a rate of $1.42 per MMBtu, in an attempt to maintain NGA producer revenue levels, it cannot be shown that such a procedure

would be applicable to all (or any) sales of that subcategory of section 104 gas. This is true because, as explained earlier, the number of MMBtu's per Mcf varies with delivery conditions, and delivery conditions vary widely.[17] Furthermore, adoption of the $1.42 price elevates an arbitrarily-derived Btu adjustment factor above the cost-referenced base price as the conceptual vehicle for converting NGA rates to NGPA maximum lawful prices, based on mere semantic happenstance. Although both the maximum lawful prices and this arbitrary adjustment factor are expressed in terms of Btu's, their conceptual underpinnings are entirely different and cannot be reconciled.

Absent a direct correlation between the NGA and NGPA prices, the Commission feels justified in adopting $1.45 (the base price) as the maximum lawful price for the Opinion 770-A subcategory of section 104 gas. Under the NGA pricing scheme, $1.45 was essentially the quotient obtained by dividing projected finding and production costs by the reported number of Mcf's that would ultimately be produced from discovered reserves. The production data were based on the number of Mcf's available at actual delivery conditions. The touchstone for this computation was the concept of an "average Mcf." Such an average Mcf would typically contain approximately seven to seventy pounds of water vapor per MMcf.[18] The adjustment for Btu content, based on standard conditions, was simply superimposed on this per-unit-delivered, cost-referenced rate. It assumed a water vapor content

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[17] Although many interstate contracts limit the water vapor content of natural gas at delivery to seven pounds per MMcf, not all contracts contain such provisions, and not all gas is so composed at delivery.

[18] This assumes a delivery temperature in the range of 50°F to 70°F and delivery pressures in the range of 100 to 1000 pounds per square inch. These ranges of temperature and pressure would likely cover most delivery conditions.

of 820 pounds per MMcf. As a technical matter, its application to the production data would underestimate the average MMBtu content of the reported volumes by about 1.74%.[19]

This inconsistency in measurement methodologies could have been eliminated either by adjusting the production data prior to rate derivation or by keying the Btu adjustment to actual delivery conditions. Had the production data been converted to standard conditions to rate derivation, the number of Mcf's would have been reduced commensurate with the reduced heating value of an Mcf at standard conditions. Reduction of the denominator in the cost equation (i.e. the number of Mcf's) would have produced a base price greater than $1.45 per Mcf. Subsequent adjustments to the per-Mcf base price to reflect the Btu content of the gas at standard conditions (which represents a decrease in the number of MMBtu's at actual delivery conditions) would have resulted in a just and reasonable rate of essentially $1.45 per MMBtu actually delivered. (*See* "Sample Computation" in Appendix I.) The Commission has achieved essentially the same result for purposes of establishing the NGPA "ceiling price" for Opinion 770-A rate gas subject to section 104 by adopting $1.45 as the maximum lawful price and requiring that it be applied to the number of MMBtu's actually delivered.

The Commission believes that our conversion policy is reasonable and justified. We note that it effects the Congress' intention that the maximum lawful price stated in section 109 be identical to the maximum lawful price for gas previously subject to the Opinion 770-A rate. We are

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[19] This was no obstacle to its use for quality control purposes, however, and it had the added advantage of conforming to industry quality control practices. However, its acceptance for quality control purposes does not support, and is in fact unrelated to, its adoption as the determining factor in changing from a volume-referenced to an energy-referenced pricing scheme.

unpersuaded that we should engender the confusion and uncertainty that would result were we now to alter our decision with respect to this policy and amend the maximum lawful prices.

III. *Contractual Provisions and Monitoring*

A. *Petitioners' Arguments*

Every petitioner that filed an application for rehearing, reconsideration, or clarification of Order No. 93 interpreted Order No. 93 as possibly requiring that a purchaser pay the applicable maximum lawful price for each MMBtu actually delivered. Several petitioners noted that the majority of sales contracts price natural gas on an Mcf rather than on an MMBtu basis and provide for adjustment of the volumetric price to reflect the Btu content of the gas. They explained, with regard to this Btu adjustment, that a large number of such contracts require that the Btu content of gas be determined based on measurement at the standard conditions, despite the fact that the actual delivery conditions with respect to temperature and pressure may be different from the standard temperature and pressure conditions and the contract may require delivery of relatively dry gas (e.g. seven pounds of water vapor per MMcf). The petitioners complained that setting a "ceiling price" based on the number of MMBtu's actually delivered might nullify such contractual provisions.

Further, petitioners argued that if "ceiling prices" were based on the number of MMBtu's actually delivered, the cost of continuously monitoring actual delivery conditions would be prohibitively high. Assuming that implementation of Order No. 93 requires measurement of the Btu's actually delivered, petitioners were concerned that specific guidance had not been given as to whether and how to estimate the actual Btu content of gas at delivery conditions, other than the petitioners' inference that con-

tinuous monitoring would be required. Petitioners requested specific guidance as to what measurement procedures might be employed.

B. *Commission Decision*

Given that the NGPA pricing scheme is a significant departure from past Commission and industry practice, it is not surprising that its implementation has created confusion both for sellers and purchasers. Under the NGPA pricing scheme the "ceiling price" permitted under Title I for the sale of natural gas is based on the number of MMBtu's actually delivered. In adopting heating value as a pricing mechanism rather than a quality control index, Congress did not intend to override the terms of any contract unless the contract establishes a price in excess of the Title I "ceiling price." Thus, under the terms of a contract, natural gas may be priced by volume, by heat content, or by any other reasonable means agreed to by the parties so long as the price paid does not exceed the "ceiling price" permitted under Title I.

The Btu rule and explanatory text affect the determination of the "ceiling prices" that can be charged for natural gas under the NGPA. However, they do not require that the industry change its measurement or pricing practices. Temperature and pressure are routinely measured at the orifice meter of a natural gas sales point, and determination of Btu content for pricing purposes (based on chemical analyses or direct measurement with a calorimeter) has been required for years under the NGA pricing scheme. The Commission is aware of no significant problems with obtaining these measurements. As the Commission stated in Order No. 93,[20] we will accept any method accepted in the natural gas industry for determining the Btu content of the gas sold, including measurement procedures and measurement frequency. The

[20] 45 Fed. Reg. 49077, 49080.

Commission will also permit industry-accepted methodologies for converting Btu measurements at standard conditions to Btu content at actual delivery conditions. No further guidance needs be given except to say that the method cannot be biased so as to result in prices that exceed the permissible "ceiling prices."

IV. *Effective Date and PGA Trackers*

A. *Petitioners' Arguments*

Several petitioners, assuming that Order No. 93 requires a continuous determination of the number of MMBtu's actually delivered, requested that Order No. 93 not apply to sales that occurred prior to the effective date of the order. Two petitioners argued that making Order No. 93 effective retroactive to December 1, 1978, would violate the APA because the language of the interim rule in § 270.204 suggested that the prior Commission practice of adjusting the base price based on the number of MMBtu's measured at standard conditions, rather than the number of MMBtu's actually delivered, was to be continued under the NGPA.

Other petitioners expressed concern that they may owe money to producers for deliveries that have occurred since December 1, 1978, and requested, as an alternative to modifying the effective date of Order No. 93, that the Commission permit a one-time PGA filing to authorize passthrough of any payments required as a result of the Btu rule.

B. *Commission Decision*

Although the interim Btu rule was vague, contrary to the petitioners' allegations it was not identical to the Btu adjustment provisions contained in §§ 2.56a(c)(1) and 2.56b(d)(1) of the Commission's NGA regulations.[21]

[21] The text of the interim rule in § 270.204 reads as follows:

For purposes of determining the number of Btu's per unit volume of natural gas, the Btu content of one cubic foot of

The Commission's intent in issuing the interim Btu rule was merely to describe the standard conditions for measuring the Btu content of natural gas. Unlike the Commission's previous policy, this measurement was *not* to be "used in computing [a] rate adjustment." That phrase, which appeared in the NGA regulations, was specifically and intentionally deleted from the interim rule in § 270.204.

Nevertheless, some confusion developed because the interim rule language that replaced that phrase was itself ambiguous. Therefore, the Commission modified the wording of § 270.204 in Order No. 93 and supplied accompanying text explaining the Commission's position with respect to the issue of Btu measurement. Because Order No. 93 is but a clarification of the interim rule, it is ef-

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natural gas is the number of Btu's produced by the combustion, at constant pressure, of the amount of gas which would occupy a volume of 1.0 cubic foot at a temperature of 60 degree Fahrenheit, saturated with water vapor and under a pressure equivalent to that of 30.00 inches of mercury at 32 degrees Fahrenheit, and under standard gravitational force (980.665 centimeters per second squared) with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of the gas and air and when the water formed by combustion is condensed to the liquid state.

The text of §§ 2.56a(c)(1) and 2.56b(d)(1) reads as follows:

The Btu content of the natural gas used in computing this rate adjustment shall be the number of British thermal units (Btu) produced by the combustion, at constant pressure, of the amount of the gas which would occupy a volume of 1.0 cubic foot at a temperature of 60°F. saturated with water vapor and under a pressure equivalent to that of 30.00 inches of mercury at 32°F. and under standard gravitational force (980.665 centimeters per second squared) with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of the gas and air and when the water formed by combustion is condensed to the liquid state.

fective for all first sales of natural gas made on or after December 1, 1978, the effective date of the interim rule.

With respect to the PGA issue, natural gas pipelines under the Commission's jurisdiction will be permitted to record any necessary retroactive payments in Account 191 ("Unrecovered purchase gas costs"). Such payments should be recorded as a subaccount of Account 191 or should be otherwise separately identified. The pipeline will be afforded the opportunity to demonstrate in its next PGA filing that the claimed amounts are correct and that rate treatment is appropriate for any claimed retroactive payments.

The Commission Orders:

The applications for rehearing of Order No. 93 and Natural's petition for rehearing of the Commission's order denying its petition for partial stay of Order No. 93 are denied. The applications for stay filed by Arkla and Transco are also denied. Order No. 93 is clarified as set forth above.

By the Commission.

[SEAL]

/s/ Kenneth F. Plumb
KENNETH F. PLUMB,
Secretary.

APPENDIX I

TECHNICAL CONSIDERATIONS

The Commission has examined, among the other matters discussed in this order, certain fundamental technical considerations pertaining to the Btu Rule. Of particular interest are:

- features related to the occurrence of water in natural gas;
- factors which cause variances in the water content of natural gas and attendant changes in the heating value of natural gas; and
- considerations related to the development of producer just and reasonable rates under the NGA and the degree of compatibility between those rates and the maximum lawful prices established under the NGPA.

The following discussion addresses some of the concerns expressed by the petitioners and helps explain the Commission's rationale in reaching its decision in Order No. 93 with respect to the Btu pricing issue.

Occurrence of Water in Natural Gas

It is important at the outset to recognize that the reasons for the occurrence of water in natural gas relate to expected and natural phenomena. Most geologic formations from which natural gas is produced are the results of fragmented materials or precipitates deposited in ageous environments (e.g., shallow seas, lakes, deltas, streams, etc.). Additionally, the organic material (plant and/or sea life) from which natural gas originated was also deposited and decomposed in ageous environments. Therefore, natural gas that has accumulated in or migrated to the reservoirs from which it is now produced has been, and in most instances still is, in contact with water (i.e. the chemical compound H_2O).

Because of the physical contact of natural gas with water, water is produced along with gas. Water may be present in produced natural gas as a free liquid (i.e., in a liquid phase) or as a vapor (i.e., in a gaseous phase). Most often it is present in produced gas as both a liquid and a vapor. Free liquid water interferes with production and transportation operations and is removed from the natural gas stream. Water vapor reduces the heating value of natural gas, and it is that feature which is central to the considerations in this order and in Order No. 93.

Variance in Water Vapor Content and Heating Value

The extent to which water in any given natural gas sample or natural gas stream exists or remains in a gaseous phase, as opposed to a liquid phase, depends upon the water vapor capacity of the gas. Water vapor capacity of gas is a function of the pressure and temperature to which the gas is subjected. Changes in the pressure and temperature of gas, and resulting changes in its water vapor capacity, can occur within the reservoir; during production, separation, and treating or conditioning operations; and during pipeline entry and transportation.

The relationships between water vapor capacity and temperature and pressure are clearly shown in the graph at the end of this appendix. It is important to understand that at any set of pressure and temperature conditions, gas has a specific water vapor capacity. Once that capacity is obtained, the gas is completely saturated with water vapor. If either pressure or temperature is changed, the water vapor capacity of the gas (i.e., its saturation limit) will change. The gas would then be capable of containing either more water vapor or less water vapor, depending upon the direction of change in pressure or temperature. (See graph.)

Water has no available heat energy. Unlike the hydrocarbon compounds in natural gas, it will not combine with oxygen and generate heat through combustion. The presence of water vapor molecules in natural gas displaces energy-producing hydrocarbon molecules and, therefore, reduces the effective heating value of the gas.

Order No. 93 addressed the water vapor/heating value relationship and, among other things, articulated the standard method for measuring the heating value of natural gas. Specifically, Order No. 93 established the "standard conditions" for measuring the number of British Thermal Units (Btu's) in one cubic foot of gas:

> ". . . the gas is saturated with water vapor at 60 degrees fahrenheit under a pressure equivalent to that of 30.00 inches of mercury at 32 degrees fahrenheit, under standard gravitational force (980.665 centimeters per second squared)."

In recognition of the fact that the conditions under which gas is actually delivered would vary widely and would likely be different from the standard conditions, Order No. 93 also stated that the heating value of gas determined at standard conditions (or other measurement conditions) must be converted to reflect the heating value at actual delivery conditions in order to properly price the gas.

The standard conditions established in Order No. 93 are based on long-standing, widely-used standards for natural gas measurement. Standards are necessary in natural gas measurement because of the chemical nature and physical behavior of natural gas. In any given natural gas system (i.e., sample, stream, etc.) the following essential relationships exist:

- Gas volume expands with increased temperatures;
- Gas volume shrinks with increased pressure;

- Gas capacity to absorb water vapor increases with higher temperature;
- Gas capacity to absorb water vapor decreases with higher pressure; and
- Gas heating value (i.e., MMBtu's per Mcf) decreases with higher water vapor content, and vice versa.

The standard measurement conditions cited in Order No. 93 recognize the above relationships and their interdependence. The standards, in effect, define both volume and water vapor content. Volume is defined by the prescribed temperature and pressure conditions. Water vapor content is defined as being that quantity of water vapor that would be present in the gas if the gas were fully saturated with water vapor at the defined standard temperature and pressure.

At the defined standard conditions, water-saturated gas will contain approximately 820 pounds of water vapor per million cubic feet of total gas. However, the standard conditions would actually exist in only a very limited number of gas sale-purchase transactions, i.e., only where pressure and temperature conditions at delivery are identical to the standard conditions (30 inches of mercury and 60° F) and where the gas at delivery is saturated with water vapor.[1] Because of contractual provisions, gas delivered to a pipeline will, by comparison, often contain only about seven pounds of water per mil-

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[1] In this regard, it should be noted that the standard pressure, 30 inches of mercury, is aproximately the same as atmospheric pressure. Local and regional variances from the 30-inch standard are caused by weather patterns and differences in elevation. Operating pressures near atmospheric pressure may occur on portions of some gas distribution systems, but the pressures encountered in most production and transportation operations greatly exceed atmospheric pressure.

lion cubic feet of total gas.[2] Water vapor in gas fully saturated with water, at the defined standard pressure and temperature, will occupy about 1.74 percent of the total gas volume, whereas, water vapor in gas containing seven pounds of water vapor per million cubic feet of gas will occupy only about 0.015 percent of the total gas volume. These relationships show that there is little comparability between the amount of water vapor contained in gas at most delivery conditions vis-a-vis the amount contained at the prescribed standard conditions.

Because water vapor displaces energy-producing hydrocarbon molecules, heating value (MMBtu's per Mcf) of natural gas varies inversely with water vapor content. The effect of reducing the water vapor content of natural gas from 820 pounds per MMcf to seven pounds per MMcf is an obvious increase in the heating value (i.e., MMBtu's per Mcf) of the gas stream.

Thus a significant disparity clearly exists between the heating value of gas at the standard conditions and its heating value at actual delivery conditions. The degree of disparity is dependent upon the actual delivery conditions (pressure and temperature). Given the collage of pressure and temperature conditions at which gas sale-purchase transactions occur, there is no known, uncontroverted correction factor that would have universal application for adjusting heating value determinations at the defined standard conditions to the heating value at actual delivery conditions.

Based on this analysis the Commission has stated that the heating value of gas determined at the prescribed standard conditions (or any other test conditions) must

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[2] It should be made clear that it is physically impossible under most delivery conditions for natural gas to contain the 820 pounds of water vapor per million cubic feet of total gas that is obtained at "standard conditions." Under most delivery conditions, the maximum amount of water vapor in gas will range from about 7 to 70 pounds per million cubic feet of total gas. (*See* graph.)

be adjusted to reflect the heating value of gas at actual delivery conditions, whatever those conditions are for a particular first sale.

Compatibility of NGA and NGPA Prices

There are several considerations that should be addressed relative to the correlation between the NGA volume-referenced prices and the NGPA energy-referenced prices. Direct correlation is frustrated by an inconsistency between the concept and methodology used to derive the NGA base prices and the concept and methodology underlying Btu adjustments applied to those base prices. The basis for this inconsistency is largely historic. Specific recognition of the inconsistency itself is necessary in order to obtain compatability between the NGA and NGPA pricing schemes.

The Btu adjustment procedure was originally adopted under the Federal Power Commission's (FPC's) in-line pricing system which was based on contract provisions predominant in the producing area. It was designed to encourage producers in certain areas to deliver high Btu gas for mixing with low Btu gas that could not otherwise be brought into the interstate market.[3] In deciding that Btu content should be reported at standard conditions, the FPC noted that this requirement conformed to the requirements of Form 2 and that it was accepted by the scientific community and the natural gas industry. The FPC also noted that the Btu adjustment procedures were actually part of the in-line, contract-pricing concept because they were routinely used in contracts upon which the in-line prices were based.

Later, the FPC established area rates which initially included a rate for "flowing gas" and a rate for "new gas." That pricing approach was later amended to develop a nationwide base price for "new gas;" still later

[3] *Texaco, Inc.*, Opinion 464, 33 F.P.C. 1228, 1235 (1965).

amendments were made to recognize the "vintage" of the gas. These producer base prices were established for natural gas volumes (Mcf at 14.73 psia an 60° F) delivered to a pipeline. Adjustments to the NGA volume-referenced base prices were permitted in order to recognize variance in the heating value (MMBtu's per Mcf) of gas and were based on the results of Btu measurements at standard conditions.[4] However, as with the in-line pricing methodology, no conversion was permitted to account for the heating value at actual delivery conditions.[5]

Throughout the area and nationwide rate proceedings establishing NGA producer prices, the FPC was dealing with costs and natural gas volumes reported by the industry. The reported costs were in dollars, and the reported volumes were either the quantities of natural gas (Mcf's) actually produced on oil and gas leases, in the case of "flowing gas," or the quantities of natural gas that would ultimately be produced from discovered reserves, in the case of "new gas."

In an overly simplified explanation, the base prices were the quotient obtained by dividing these costs by these volumes. The prices, in effect, represented the average revenue requirement (within the NGA's just and reasonable standard) for producing an "average Mcf" of gas and making it available for delivery to a pipeline. A

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[4] The first attempts by the FPC at providing for Btu adjustments to volume-referenced area rates had a so-called "Btu Gap." The base price prescribed was applicable to natural gas containing 1000 to 1050 Btu's per Mcf. Adjustments to the base price were made for gas below 1000 Btu's per Mcf and for gas above 1050 Btu's per Mcf. (Permian Basin Area Rate Proceedings Opinion 468 (34 FPC 159 at 223).) No adjustment was applicable for gas in the 1000 to 1050 Btu range. Later FPC action eliminated the Btu-Gap to provide for price adjustments to the NGA base prices for gas above and below 1000 Btu's per Mcf.

[5] The standard conditions used for determining Btu content during the NGA pricing era are essentially the same as those prescribed in Order No. 93.

cost-revenue balance was implicit in these rates. It should be emphasized, however, that the reported volumes were not adjusted for quality (Btu's or otherwise) prior to rate derivation. The reported volumes were at various pressure and temperature delivery conditions, which varied substantially from the 30 inches of mercury and 60° F standard pressure and temperature conditions. As such, the reported volumes would not contain the 820 pounds of water vapor per MMcf of total gas that exist at standard conditions. Rather, the reported volumes would typically contain approximately seven to seventy pounds of water vapor per MMcf. Therefore, the heating value per Mcf at delivery conditions would be significantly greater than the heating value per Mcf of the same gas if referenced to standard conditions.

In essence, then, imposition of the Btu adjustment procedure on the cost-revenue balancing scheme introduced a foreign element into the pricing methodology employed by the FPC in setting the base prices. That foreign element is the source of the present pricing controversy under the NGPA.

In order to have resolved this inconsistency for purposes of establishing a base price comparable on an energy-equivalent basis to volumes at standard conditions, the delivered volumes would have had to be decreased. The resulting base price would have been correspondingly increased. Subsequent Btu adjustments to the base price (i.e., the price per Mcf of 1 MMBtu per Mcf gas at standard conditions) would have resulted in pricing the gas essentially on an as-delivered-MMBtu basis.[6]

The effect of the failure to resolve this inconsistency is an understatement of the actual number of MMBtu's

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[6] In the alternative, the Btu adjustment could have been based on actual delivery conditions. *See* "Sample Computation Showing Lack of Direct Correlation Between Previously Established NGA Volume-Referenced Prices and NGPA Energy-Referenced Prices."

contained in each Mcf delivered to the buyer. With the relatively low gas prices of the past, the inconsistency apparently was acceptable for quality control and for pricing purposes to both the seller and the buyer.[7] However, the change under the NGPA to reliance on heat content (MMBtu's) of gas as a price determinant rather than a quality control adjustment to a volume-referenced base price, has created a controversy which can be traced to this inconsistency. Under the NGPA, prices are established for the quantity of heat energy (MMBtu's) involved in a first sale. The NGPA pricing structure makes no specific reference to volumes or volume measurement. (In actual practice, however, most gas involved in producer-pipeline transactions is still measured on a volumetric basis although it is now priced on an energy basis.) If gas is now to be priced on the basis of the heating energy actually delivered to a buyer, the former NGA adjustment procedures with respect to heating value are not technically correct for use in the energy-referenced pricing scheme. Those procedures evolved from the in-line pricing era, during which natural gas prices were based on contract provisions predominant in the producing area. They made sense for quality control purposes and for encouraging the delivery of high Btu gas. When carried forward to the area and national ratemaking methodologies, which abandoned the in-line, contract-referenced pricing concept, they created a basic technical inconsistency between the base prices and the Btu adjustments made to those base prices. Whatever previous usefulness may have derived for producer ratemaking purposes from the Btu adjustment procedures no longer exists. The procedures have now become a "vestigial organ" and are not an integral component of the NGPA pricing anatomy.

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[7] What support exists for the prescribed NGA Btu adjustment producer derives from its identity with provisions in most producer-pipeline contracts.

Conclusion

In addition to being technically (and legally) correct, the Btu measurement and pricing procedures should also be administratively efficient. The procedures described in Order No. 93 satisfy those tests. Therefore, to the extent that it is contractually permissible, the actual delivery conditions, whatever they are, should be recognized in determining the quantity of heat energy involved in a gas sales/ purchase transaction. Any other approach, as well as a downward adjustment of the maximum lawful prices, would not be technically correct and would likely result in administrative "nightmares" for regulatory agencies and for all segments of the natural gas industry.

Sample Computation Showing Lack of Direct Correlation Between Previously Established NGA Volume-Referenced Prices and NGPA Energy-Referenced Prices

- Assume cash flow of $1 million.
- Assume reported volumes are 1 million Mcf.
- Assume gas is "dry" (i.e., contains no water vapor) and has a heating value of 1 MMBtu per Mcf.
- The correct price under the NGPA pricing procedures should be $1.00 per MMBtu of gas actually delivered.

However, application of the NGA base-price Btu adjustment procedure would produce the following results:

The heating value of the gas would be converted from actual delivery conditions to "standard conditions" and would, therefore, contain:

1 MMBtu/Mcf × (100.00% Total Gas − 1.74% water vapor) = 0.9826 MMBtu/Mcf

The revenues generated as a result of this Btu adjustment would be determined as follows:

0.9826 MMBtu/Mcf×1 million Mcf
×$1.00/MMBtu=
982,600 MMBtu×$1.00/MMBtu=$982,600

In order to use the NGA base-price Btu adjustment procedure and generate a cash flow equivalent to $1,000,000, the reported volumes would have to be adjusted downward so as to produce a higher "base rate." The adjusted base rate ("B") needed to maintain revenues would be computed as follows:

$$\$1{,}000{,}000 = 0.9826 \text{ MMBtu/Mcf} \times 1 \text{ million Mcf} \times B$$

$$B = \frac{\$1{,}000{,}000}{0.9826 \text{ MMBtu/Mcf} \times 1 \text{ million Mcf}}$$

$$B = \frac{\$1{,}000{,}000}{982{,}600 \text{ MMBtu}}$$

$$B = \$1.017/\text{MMBtu}$$

The downward adjusted volumes needed to derive the $1.0177 per MMBtu rate would be computed as follows:

1 Mcf of gas at actual delivery conditions contains 1 MMBtu. If the gas were converted to standard conditions the same Mcf would contain 0.9826 MMBtu's because water vapor would occupy 1.74% of the total gas volume. The "energy equivalent" volumes at actual delivery conditions would, therefore, have to be reduced by 1.74%:

1 million Mcf×(100.00%−1.74%)=982,600 Mcf

The adjusted base rate ("B") would result from the following:

$$B = \frac{\$1{,}000{,}000}{982{,}600 \text{ Mcf} \times (1 \text{ MMBtu/Mcf})}$$

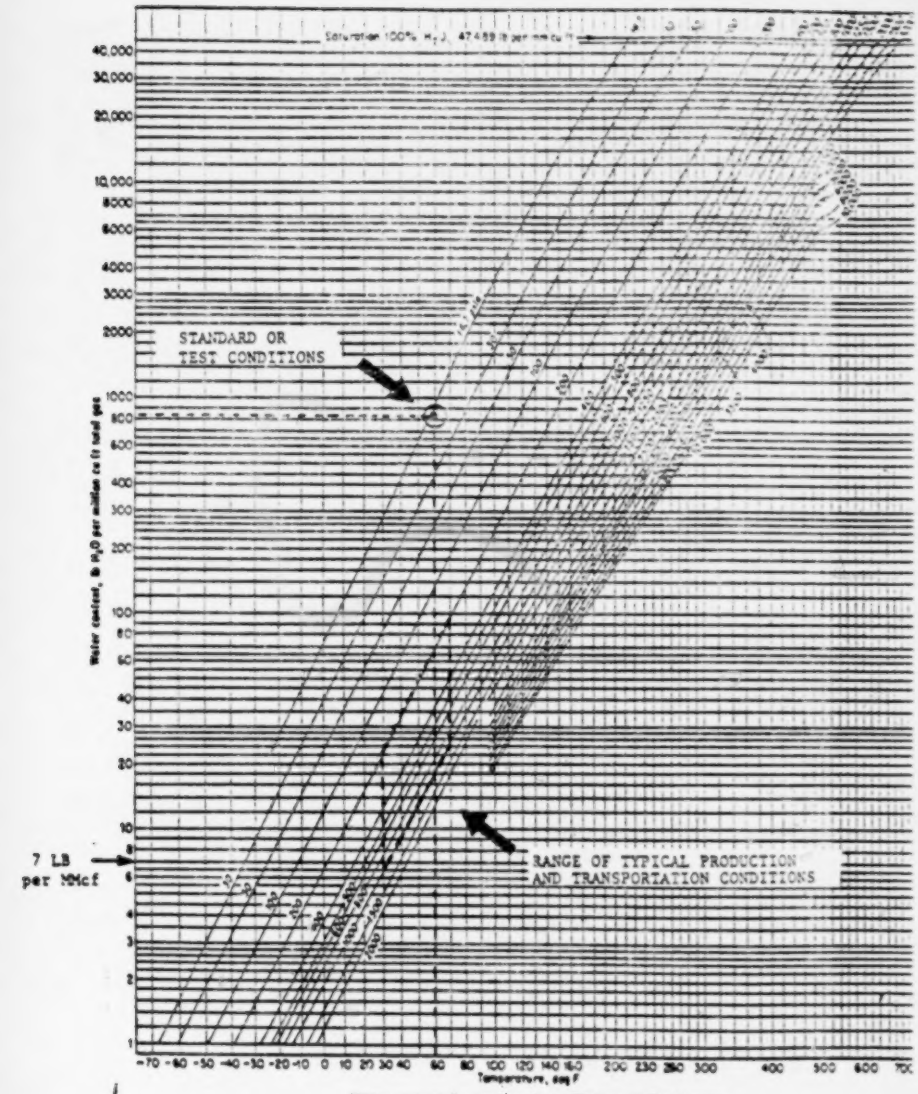
$$B = \$1.0177/\text{MMBtu}$$

The revenues generated under this procedure would be as follows:

0.9826 MMBtu/Mcf×1 million Mcf
×$1.0177/MMBtu=
982,600 MMBtu×$1.0177/MMBtu=$1,000,000

This example demonstrates that in order to obtain correct pricing for MMBtu's actually delivered, using the NGA base-price Btu adjustment procedures, volumes reported at actual delivery conditions (here assumed to contain no water vapor) would have to be reduced prior to deriving a "base rate" per Mcf. If this is not done, revenues would be less than the requisite cash flow. *Note*, however, that this is only an explanatory computation. The same correct result is obtained under the NGPA pricing procedures if the NGA per Mcf base price is retained and expressed on a per-MMBtu basis and the heating value of the gas is determined based on actual delivery conditions. In this example:

1 MMBtu/Mcf×1 million Mcf
×$1.00/MMBtu=$1,000,000



Water content of natural gas in equilibrium with liquid water.

Ref: Adapted from Katz, Cornell, Kobayashi, Poettmann, Vary, Elenbaas and Weinaug, Handbook of Natural Gas Engineering (McGraw-Hill Book Company, Inc., New York, Toronto, London, 1959). Reprinted with permission © 1959 McGraw-Hill Book Company, Inc.

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: C. M. Butler III, Chairman;
Matthew Holden, Jr., and
J. David Hughes.

Docket No. RM80-33

FINAL RULES FOR PART 270,
SUBPART B, SECTIONS 270.201,
270.202, and 270.204

ORDER DENYING APPLICATIONS FOR REHEARING OF ORDER NO. 93-A AND LIMITED STAY OF ORDER NOS. 93 AND 93-A

(Issued July 30, 1981)

On April 24, 1981, the Commission issued Order No. 93-A (Docket No. RM80-33; 46 *Fed. Reg.* 24537; May 1, 1981) denying rehearing and clarifying Order No. 93 (45 *Fed. Reg.* 49077; July 23, 1980). On May 26, 1981, Associated Gas Distributors (AGD) and Lone Star Gas Company (Lone Star) filed, separately, applications for rehearing of Order No. 93-A. Further, on June 23, 1981, Lone Star filed an application for a limited stay of Order Nos. 93 and 93-A. By this order those applications are denied.

I. BACKGROUND

Order No. 93 amended and issued as final rules the interim regulations [1] relating to first sales of natural gas

[1] The interim rule read as follows:

§ 270.204 *Btu content per unit volume of natural gas.*

For purposes of determining the number of Btu's per unit volume of natural gas, the Btu content of one cubic foot of

that are resales and the standard for determining the Btu content of natural gas. Several applications contested that part of the rule (contained in § 270.204) establishing the standard for determining the Btu content of gas (Btu rule).

With regard to the Btu rule, in Order No. 93 the Commission responded to the comments on the interim rule, interpreted the interim rule, and modified the language of the final rule to more clearly reflect that interpretation. Specifically, it stated that measurement of the Btu content of gas must reflect the actual condition of the gas, and, therefore, the actual Btu content of the gas on delivery. This rule differs from the regulations which implemented the Natural Gas Act (15 U.S.C. §§ 717-717 (w)) in that the just and reasonable rates prescribed under the Natural Gas Act were based on the number of Mcf's delivered and included a quality adjustment determined by the number of MMBtu's measured at standard (saturated) conditions. Measurement at the prescribed standard conditions consistently under-stated the Btu content of the gas on delivery.

The Commission's position under the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. §§ 3301-3342, explained in both Order No. 93 and Order No. 93-A, applies the maximum lawful prices prescribed by the NGPA to the number of MMBtu's, rather than Mcf's, delivered

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natural gas is the number of Btu's produced by the combustion, at constant pressure, of the amount of gas which would occupy a volume of 1.0 cubic foot at a temperature of 60 degrees Fahrenheit, saturated with water vapor and under a pressure equivalent to that of 30.00 inches of mercury at 32 degrees Fahrenheit, and under standard gravitational force (980.665 centimeters per second squared) with air of the same temperature and pressure as the gas, when the water formed by combustion is condensed to the liquid state. (43 Fed. Reg. 56448; December 1, 1978)

in a first sale. The Btu rule, as amended by Order No. 93, became effective as a final rule August 18, 1980.[2]

In addition to denying rehearing of Order No. 93, Order No. 93-A clarified the Btu rule by presenting a full explanation of its rationale for adopting a Btu rule that reflects the actual condition of the gas on delivery. The Commission again stated that the interim rule, as well as the final rule, permitted the maximum lawful price for first sales of natural gas to be determined on the basis of the number of Btu's actually delivered. The clarification, therefore, made the interpretation effective for all first sales of natural gas made on or after December 1, 1978 (the effective date of the interim rule).

II. APPLICATIONS FOR REHEARING

Both AGD and Lone Star challenged the retroactive effective date of the clarification expressed in Order No. 93-A. In Order No. 93 the Commission clearly expressed its interpretation of the interim Btu rule:

> Several comments noted that § 270.204 provides that Btu content must be measured on a "saturated

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[2] The final rule reads as follows:

§ 270.204 *Btu content per cubic foot of natural gas.*

(a) *Measurement.* The Btu content of one cubic foot of natural gas under the standard conditions specified in paragraph (b) of this section is the number of Btu's produced by the complete combustion of such cubic foot of gas, at constant pressure with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of the gas and air and when the water formed by such combustion is condensed to a liquid state.

(b) *Standard conditions.* The standard conditions for purposes of paragraph (a) of this section are as follows: The gas is saturated with water vapor at 60 degrees Fahrenheit under a pressure equivalent to that of 30.00 inches of mercury at 32 degrees Fahrenheit, under standard gravitational force (980.665 centimeters per second squared).

with water vapor" basis rather than on the basis of the actual water vapor content of the gas delivered. The comments asserted that under this rule the seller would be paid for less Btu's than would actually be delivered if the gas were sold on a dry (unsaturated) basis.

This assertion is erroneous. Section 270.204 merely describes the test standard for expressing the number of Btu's contained in a cubic foot of gas under certain conditions. Under this standard, the heat value is expressed as the number of Btu's per cubic foot of gas "saturated with water vapor." The Commission is aware that the water vapor content or pressure of the gas when tested may be different than described in this standard, and may also be different than the conditions that obtain when the gas is delivered.

Therefore, the results obtained under test conditions, be they those in the rule or others, must be converted to figures that reflect the actual condition of the gas on delivery in order to properly price the gas. (45 *Fed. Reg.* at 49080.)

That interpretation is clearly consistent with the clarification expressed in Order No. 93-A. Accordingly, Order No. 93-A was made effective as of December 1, 1978, the effective date of the interim rule. Lone Star's and AGD's assertion that Order No. 93-A effected a rule retroactively is without merit.

Lone Star challenged the merits of the Commission's decision, asserting that the Btu rule contradicts past Commission and industry practice and the intent of Congress. These issues were raised in the application to rehear Order No. 93. In Order No. 93-A the Commission fully discussed these issues and denied the applications for rehearing. For the reasons discussed in Order No. 93-A, Lone Star's application is denied.

III. APPLICATION FOR LIMITED STAY

On June 23, 1981, Lone Star also filed an application seeking a stay of the retroactive application of § 270.204 as interpreted by Order Nos. 93 and 93-A. Specifically Lone Star seeks stay of the orders to the extent they require Lone Star to make retroactive adjustment of the prices it paid producers for gas purchases prior to April 24, 1981, the date Order No. 93-A was issued.

The application for a limited stay of Order Nos. 93 and 93-A, pending judicial review, is denied.

THE COMMISSION ORDERS:

(1) The applications for rehearing of Order No. 93-A filed by Associated Gas Distributors and Lone Star Gas Company are denied.

(2) The application of Lone Star Gas Company for a limited stay of Order Nos. 93 and 93-A, pending judicial review, is denied.

By the Commission.

[SEAL]

/s/ Kenneth F. Plumb
KENNETH F. PLUMB,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: C. M. Butler, III, Chairman;
Georgiana Sheldon,
Matthew Holden, Jr., and
J. David Hughes.

Docket No. RM80-33

FINAL RULES FOR PART 270,
SUBPART B, SECTIONS 270.201,
270.202, AND 270.204

ORDER VACATING ORDER DENYING REHEARING OF ORDER NO. 93-A AND LIMITED STAY OF ORDER NOS. 93 AND 93-A

(Issued August 20, 1981)

For the reasons set forth in "Order Granting Partial Stay of Order Nos. 93 and 93-A Pending Further Order" issued today, we hereby vacate the following aspects of our order of July 30, 1981 entered in this docket:

1) The denial of rehearing as to the effective date of the standard prescribed for measuring the Btu content of natural gas in calculating the maximum lawful prices under the Natural Gas Policy Act of 1978 (15 U.S.C. §§ 3301-3432); and

2) The denial of the application of Lone Star Gas Company for a partial stay.

The Commission Orders:

Subject to the approval of the United States Court of Appeals of the District of Columbia Circuit, the

order of July 30, 1981, entered in the above docket is vacated in the respects described above.

By the Commission.

[SEAL]

/s/ Kenneth F. Plumb
KENNETH F. PLUMB,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: C. M. Butler, III, Chairman;
Georgiana Sheldon,
Matthew Holden, Jr., and
J. David Hughes.

Docket No. RM80-33

FINAL RULES FOR PART 270,
SUBPART B, SECTIONS 270.201,
270.202, AND 270.204

ORDER GRANTING PARTIAL STAY OF ORDER NOS. 93 AND 93-A PENDING FURTHER ORDER

(Issued August 20, 1981)

On July 16, 1980, the Commission issued Order No. 93 (Docket No. RM80-33; 45 *Fed. Reg.* 49077; July 23, 1980) amending and issuing as final rules the regulation in 18 C.F.R. § 270.204 relating to the standard for determining the Btu content of natural gas. On April 24, 1981, the Commission issued Order No. 93-A, entitled "Order Denying Rehearing and Clarifying Order No. 93" (46 *Fed. Reg.* 24537; May 1, 1981). On July 22, 1981, El Paso Natural Gas Company filed a petition requesting full or partial stay of Order Nos. 93 and 93-A.

Order No. 93-A stated that the measuring standard prescribed in Order No. 93 took effect on December 1, 1978. We wish to reconsider that conclusion. Many pipelines have not yet paid all sums which would be due on the basis of that effective date. To that extent, we wish

to preserve the status quo pending reconsideration of the question of the effective date.[1]

The Commission Orders:

Order Nos. 93 and 93-A are stayed, pending further order, insofar as they concluded that the standard they prescribed for determining Btu content of natural gas was in effect from December 1, 1978, to April 24, 1981 (the date Order No. 93-A was issued). This order is subject to the approval of the United States Court of Appeals for the District of Columbia Circuit.

By the Commission.

[SEAL]

/s/ Kenneth F. Plumb
KENNETH F. PLUMB,
Secretary.

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[1] Should this reconsideration produce a different conclusion as to the effective date, we will make appropriate adjustments to relieve those who already paid in whole or in part.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: C. M. Butler, III, Chairman;
J. David Hughes and
A. G. Sousa.

Docket No. RM80-33

FINAL RULES FOR PART 270,
SUBPART B, SECTIONS 270.201,
270.202, AND 270.204

ORDER VACATING PARTIAL STAY AND AMENDING REGULATIONS

(Issued December 24, 1981)

On August 20, 1981, the Federal Energy Regulatory Commission (Commission) granted a partial stay of the December 1, 1978, effective date of the Btu rule (18 C.F.R. § 270.204), pending further order, for the period December 1, 1978, to April 24, 1981. The Btu rule prescribes the standard for determining the Btu content of natural gas in calculating maximum lawful prices under the Natural Gas Policy Act of 1978 (15 U.S.C. §§ 3301-3432) (NGPA).

The Commission has reconsidered the effective date of the Btu rule. For the reasons discussed herein and previously stated in Order Nos. 93 and 93-A, the Commission reaffirms the December 1, 1978, effective date. Accordingly, the partial stay of the effective date is vacated, and, effective December 1, 1978, maximum lawful prices for first sales of natural gas are to be determined by the actual Btu's delivered. In addition, § 270.204 of the Commission's regulations is clarified by adding a new para-

graph stating that the maximum lawful price for any first sale is applied to the Btu's actually delivered.[1]

I. BACKGROUND

The NGPA was signed into law on November 9, 1978. On November 28, 1978, the Commission issued interim regulations, effective December 1, 1978, to implement the NGPA. One of the interim regulations was § 270.204. That section described the standard test conditions for determining the Btu content of a unit volume of natural gas.

On July 16, 1980, the Commission issued Order No. 93 (45 *Fed. Reg.* 49077, July 23, 1980) in the instant docket which, *inter alia*, amended and issued in final form the interim regulation in § 270.204. In response to comments questioning the relationship of the interim regulation to determination of maximum lawful prices under the NGPA, the Commission clarified that the maximum lawful price for first sale of natural gas is determined by adjusting the results obtained under the test conditions set forth in § 270.204 to reflect the actual Btu content of the gas at delivery conditions (Btu rule). This interpretation applied to both the interim regulation and the final rule.

On April 24, 1981, the Commission issued Order No. 93-A (46 *Fed. Reg.* 24537, May 1, 1981) which denied rehearing. The order explained in more detail the Commission's rationale for adopting the Btu rule. The Commission again stated that under the interim rule, effective December 1, 1978, as well as the final rule, the maximum lawful price for first sales of natural gas is to be

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[1] Persons allegedly aggrieved by the Commission's decision have previously sought, and been denied, rehearing on the effective date issue. This order is essentially the result of a reconsideration, on the Commission's own motion, of the denial of rehearing. Because the Commission merely reaffirms its prior orders, rehearing of this order is not a prerequisite for judicial review.

determined on the basis of the number of Btu's actually delivered and that the test results obtained pursuant to § 270.204 are to be adjusted accordingly.

Subsequently, several applications for rehearing and stay of Order No. 93-A were filed. The applications objected to the December 1, 1978, effective date of the Btu rule. On July 30, 1981, the Commission denied the petitions for rehearing and stay.

On August 20, 1981, the Commission vacated its July 30 order denying rehearing and stay and granted a stay of the effectiveness of the Btu rule for the period December 1, 1978, to April 24, 1981. The Commission stated therein that it would reconsider the December 1, 1978, effective date.

Numerous petitions for review had been filed in the United States Court of Appeals for the District of Columbia Circuit after rehearing was denied in Order No. 93-A and the July 30 order. For this reason, the order vacating the order denying rehearing and granting a partial stay was made subject to the Court's approval and the Commission sought remand of the record. On September 17, 1981, the court remanded the record.[2]

II. COMMISSION DECISION

In implementing the NGPA, the Commission has required that maximum lawful prices "per MMBtu" be determined on the basis of the MMBtu's actually delivered in a first sale. That requirement is not at issue here. The only question now before the Commission is whether the December 1, 1978, effective date is appropriate. The Commission believes that it is.

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[2] This order resolves the issue before the Commission. Therefore, the Solicitor is directed to transmit a copy of this order to the United States Court of Appeals for the District of Columbia Circuit.

Prior to the Commission's clarification in Order No. 93 of the relationship of the test conditions outlined in § 270.204 to the determination of maximum lawful prices, the record indicates there was some confusion in the natural gas industry on the issue of whether the test results must be adjusted in order to determine maximum lawful prices. Some producers apparently demanded that maximum lawful prices be applied to the actual Btu's delivered in a first sale.[3] On the other hand, some pipelines insisted that maximum lawful prices be applied to the Btu's determined under the standard conditions described in § 270.204, without further adjustment to reflect actual delivery conditions, which is similar to the method used to determine just and reasonable rates under the Natural Gas Act (15 U.S.C. §§ 717-717(w)). Thus, it does not appear from a review of the record that there was an interpretation different from the Commission's that was uniformly adopted throughout the industry. Under these circumstances, the Commission is not persuaded to change the December 1, 1978, effective date of the Btu rule, so as to impose a different interpretation for the period prior to the issuance of Order No. 93.

The Commission emphasizes, as it did in Order No. 93-A, that the Btu rule does not require that the industry change its measurement or pricing practices. Application of the Btu rule to a first sale merely determines the maximum lawful price that can be charged for natural gas under the NGPA. The rule neither alters the method called for in the contract for measuring the Btu content of the gas, nor requires payment for a price different from that provided for by the contract, as long as it is at or below the applicable maximum lawful price.

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[3] *See, e.g.*, Joint Supplemental Comments of Indicated Producers, filed January 31, 1979, at 6; Application of Indicated Producers for Rehearing, filed February 2, 1979, at 13.

III. AMENDMENT to § 270.204

The Commission is amending the language of § 270.204 of its regulations by adding a new paragraph (c) to reflect the Commission's interpretation of the NGPA and its regulations that the maximum lawful price prescribed under the NGPA for any first sale applies to the Btu's actually delivered in that sale.

In accordance with section 553(b) and (c) of the Administrative Procedure Act (5 U.S.C. § 553) (APA), the Commission finds that public notice and comment are unnecessary, because this amendment is merely a clarification and effects no substantive change in the regulations. For the same reasons, the Commission, in accordance with section 553(d) of the APA, makes the amendment effective December 1, 1978, the effective date of the interim regulation.

The Commission orders:

For the reasons set forth above, the Commission orders:

(1) the partial stay of the Btu rule for the period December 1, 1978, to April 24, 1981, is vacated; and

(2) § 270.204 of Subpart B, Chapter I of Title 18, Code of Federal Regulations is amended as set forth below, effective December 1, 1978.

(Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350, 15 U.S.C. §§ 3301-3432.)

By the Commission.

[SEAL]

/s/ Kenneth F. Plumb
KENNETH F. PLUMB,
Secretary.

Section 270.204 is amended by adding a new paragraph (c) to read as follows:

§ 270.204 *Btu content per cubic foot of natural gas*

* * * *

(c) *Application of the maximum lawful price.* The maximum lawful price prescribed by the NGPA and this part for any first sale of natural gas applies to the Btu's actually delivered in that first sale.

APPENDIX C

TITLE 18—CONSERVATION OF POWER AND WATER RESOURCES

CHAPTER I—FEDERAL ENERGY REGULATORY COMMISSION

[DOCKET NO. RM79-3]

SUBCHAPTER A—GENERAL RULES

PART 2—GENERAL POLICY AND INTERPRETATIONS

SUBCHAPTER E—REGULATIONS UNDER THE NATURAL GAS ACT

PART 157—APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND ORDERS PERMITTING AND APPROVING ABANDONMENT UNDER SECTION 7 OF THE NATURAL GAS ACT

SUBCHAPTER H—REGULATION OF NATURAL GAS SALES UNDER THE NATURAL GAS POLICY ACT OF 1978

PART 270—RULES GENERALLY APPLICABLE TO REGULATED SALES OF NATURAL GAS

PART 271—CEILING PRICES

PART 273—COLLECTION AUTHORITY; REFUNDS

PART 274—DETERMINATIONS BY JURISDICTIONAL AGENCIES

PART 275—COMMISSION DETERMINATIONS AND COMMISSION REVIEW OF JURISDICTIONAL AGENCY DETERMINATIONS

PART 276—REPORTS

SUBCHAPTER I—OTHER REGULATIONS UNDER THE NATURAL GAS POLICY ACT OF 1978

PART 284—CERTAIN SALES AND TRANSPORTATION OF NATURAL GAS

INTERIM REGULATIONS IMPLEMENTING THE NATURAL GAS POLICY ACT OF 1978

AGENCY: Federal Energy Regulatory Commission.

ACTION: Interim Regulations.

SUMMARY: The Natural Gas Policy Act of 1978 (NGPA), enacted November 9, 1978, takes effect with respect to certain first sales of natural gas delivered on or after December 1, 1978. The new statutory provisions relating to pricing of natural gas and other issues must, therefore, be implemented by regulation by that date. These regulations implement certain provisions of the NGPA, and are issued as interim regulations.

PUBLIC HEARINGS: Dates and locations to be announced.

DATE: Written comments by January 31, 1979, except as otherwise noted.

EFFECTIVE DATE: December 1, 1978

ADDRESS: Office of the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426 (Reference Docket No. RM79-3)

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I. INTRODUCTION

On November 9, 1978, the Natural Gas Policy Act of 1978 (NGPA) was signed into law. By passage of the NGPA, Congress has mandated a new legislative framework for the regulation of most facets of the natural gas industry. The new law affects sales, transmission and distribution of natural gas. The previously controlling federal regulatory statute, the Natural Gas Act (NGA) has in many respects been limited, replaced or superseded by the NGPA, although it continues to be of significance with respect to gas previously dedicated to interstate commerce.

A primary effect of the NGPA is the substitution of a series of specific statutory maximum price levels applicable to discrete types of "first sales" of natural gas for the previously established system of price regulation of interstate sales of natural gas which had been grounded in a cost-based methodology. An important distinction between producer regulation under the NGA and the NGPA is the expansion of the Federal Energy Regulatory Commission's (Commission) jurisdictional scope to encompass not only sales made in interstate commerce but in intrastate commerce as well. Under the NGPA, all first sales of natural gas are controlled by the maximum statutory ceiling rates and as a result, it is unlawful for any person to sell natural gas at a price in excess of the statutory maximum regardless of whether the sale occurs in the inter- or intrastate market.

The Commission wishes to call specific attention to the provisions of section 101(b)(9) of the NGPA. The Congress, by that provision, emphasizes and makes clear that the maximum lawful prices under the NGPA are *ceiling* prices and do not supersede or nullify the effectiveness of any contractual agreement to pay a lower price. Therefore, the Commisison cautions producers not to assume entitlement to any NGPA ceiling price which is higher than their contract prices.

The Commisison is directed to administer essentially all of the NGPA and is authorized to perform any and all acts and to prescribe and issue such rules and orders as it finds necessary or appropriate to carry out its functions under the NGPA. On November 13, 1978, the Commission proposed interim regulations as the first step in implementing the NGPA. These interim regulations, contained in this notice, mark the second step in carrying out the basic responsibilities for implementation and administration of the Act and provide a mechanism for transition from the NGA regulating regime to the NGPA scheme.

The NGPA is divided into six titles:

I. Pricing

A. Price Controls Applicable to Sales of Natural Gas

B. Decontrol of Certain Natural Gas Prices

II. Incremental Pricing

III. Additional Authorities and Requirements

A. Emergency Authorities

B. Other Authorities and Requirements

IV. Natural Gas Curtailment Policies

V. Administration, Enforcement, and Review

VI. Coordination with the Natural Gas Act, Effect on State Laws

The interim regulations prescribed here do not implement all titles under the NGPA. Rather, the regulations propose to deal with those areas demanding the most expeditious treatment.

This first group of regulations is designed to set in motion the new scheme for pricing of first sales of natural

gas and to provide mechanisms for implementation of provisions of the NGPA covering certain arrangements for transportation of natural gas. However, before setting out in detail a full description of the specific regulations proposed, a summary of the most salient features of the NGPA, the effect on regulation under the NGA, and a capsule description of the implementing regulations and corollary modifications of regulations under the NGA, may be useful.

THE LEGISLATIVE SCHEME OF THE NGPA

The nature and scope of Commission regulation of producer sales under the NGPA has been substantially transformed from utility-type regulation of a limited market to what is essentially price regulation of an entire national market. Under the scheme set up the NGPA, there exist two major categories of first sales: those requiring a prior determination of eligibility to be made by a jurisdictional federal or state agency (within the meaning of the NGPA) before collection of the maximum lawful price and those not explicitly requiring such a determination. A decision as to whether a first sale falls into a category requiring a determination is fundamental. A decision to seek a determination triggers quite different regulatory consequences than a decision not to seek a determination.

Although under certain provisions the Commission may be called upon to return to the cost-based, just and reasonable methodology within the meaning of the NGA in establishing rates in excess of the NGPA ceiling prices, the basic administration of the pricing provisions of the NGPA will be undertaken from an entirely different perspective. The Commission will no longer inquire into producer costs or set permissible rates of return for producers. Instead, the Commission's focus will center on whether geological information, production history, field records, prior contractual relationships and information

of a similar nature support the categorization for pricing purposes claimed by producers.

Another crucial factor in anticipating what regulatory treatment will be accorded producer sales of natural gas is whether gas is "committed or dedicated" for purposes of NGA regulation. The limitations on NGA regulation as a result of enactment of the NGPA will be addressed in another section of this preamble. However, the distinction between gas which is deemed to be subject to continuing regulation under the NGA and gas which falls solely within the NGPA regulatory format is significant and affects both pricing and nonpricing regulation of producer matters.

For categories of gas requiring a prior determination by a federal or state agency, the Commission's function is more in the nature of an appellate body, reviewing, on a substantial evidence basis, the factual determinations of the appropriate jurisdictional agency with the right of disapproval in the event the initial determination is not adequately substantiated. The Commission rules reflect this role and prescribe the basic and minimum factual foundation necessary to meet its review responsibilities without directly interposing the Commission into the procedural functioning of the jurisdictional agency. The review process of initial determinations begins when notice is received of a jurisdictional agency's determination with the appropriate supporting material specified in Part 274 of the proposed regulations. In the absence of a reversal, the determination of the jurisdictional agency becomes final and no longer subject to review unless based on any untrue statement of material fact or upon any omission of material fact which omission was misleading.

Categories of first sales explicitly requiring that a determination as to qualification to collect the maximum lawful price be made by either a jurisdictional federal or state agency are:

—section 102 which sets a maximum lawful price for for first sales of new natural gas (gas produced from a new lease on the Outer Continental Shelf (OCS) or certain new onshore wells) and gas produced from any old OCS lease which was from a reservoir discovered after July 27, 1976;

—Section 103 which sets a maximum price for first sales of new onshore production wells;

—Section 107 which sets a maximum lawful price for first sales of high-cost natural gas including gas produced from geopressurized brine, coal seams, Devonian shale or gas produced under other conditions the FERC determines to present "extraordinary" risks or costs; and

—Section 108 which sets the maximum lawful price for first sales of stripper well natural gas.

An essential element in the regulatory system established with respect to categories requiring a prior determination is the provision for interim collection procedures by producers awaiting a final determination or the outcome of a review of such determination. The Commission has a concomitant power to require refunds from the producer if the gas eventually qualifies for a lower price. Section 503(e) sets out this collection and refunding procedure.

Part 273 of the regulations states the prerequisites for interim collection. First, the Commission has established a "transitional rule" to permit the collection by producers of the section 109 price if a producer files for a determination by March 1, 1979. Additional rules are established for interim collection pending and following a state or federal agency determination.

Those first sales of natural gas not requiring a prior determination to be made by a jurisdictional federal or state agency are tied to previously existing contractually

set prices or price levels established by the Federal Power Commission or this Commission. First sales not requiring a prior determination under the NGPA are:

—section 104 which incorporates by reference the just and reasonable rates established under the NGA for first sales of gas committed or dedicated to interstate commerce on the day before the date of enactment of the NGPA;

—section 105 which establishes maximum lawful prices for first sales under existing contracts of natural gas not previously committed or dedicated to interstate commerce;

—section 106 which establishes maximum lawful prices for first sales under interstate and intrastate rollover contracts; and

—section 109 which establishes the maximum lawful price for first sales of natural gas from the Prudhoe Bay in Alaska and categories of gas not otherwise covered by other sections of the NGPA.

The Commisison has general administrative and enforcement authority under the NGPA and the NGA to order refunds in cases where the maximum lawful price level has been improperly exceeded.

EFFECT OF THE NGPA UPON CONTINUED NGA REGULATION

Natural gas which remains committed or dedicated to interstate commerce on the day before the date of enactment of the NPGA, or which is not specifically exempted from the jurisdictional consequences of commitment or dedication by the NGPA, remains subject to all the non-price regulatory requirements of the NGA. An important aspect of continued NGA regulation is the requirement that a producer file an abandonment application with the FERC pursuant to section 7(b) of the NGA before termi-

nating service to the interstate market or before abandonment of facilities used to render interstate service. Additionally, although price regulation of first sales by producers of gas committed or dedicated is now governed by the NGPA, sections 104 and 106(a) are grounded in previously established rates under the NGA. As a result, producers wishing to establish their right to collect under these sections will be required to make a filing under their rate schedules under the NGA. The Commission has amended its previously existing filing requirements to provide new procedures governing these rate increase filings.

If gas is not committed or dedicated to interstate commerce as defined in section 2(18) or is exempted from the jurisdiction of the NGA under section 601(a)(1)(B) as high cost natural gas, new natural gas, or natural gas produced from any new onshore production well, the prior framework of utility-type regulation under the NGA no longer applies.

If natural gas sales are freed from the requirements of the NGA, several adjuncts to NGA regulation are obviated. First, there is no longer any necessity for a producer to seek certification of the sale as serving the public convenience and necessity. The replacement for this requirement under the NGPA is limited to the prior determination mechanism, where applicable, and the pricing limits established in the NGPA. New sales of such gas in interstate commerce no longer require certification as a prerequisite to commencement of deliveries. Nor does the requirement for abandonment authorization before termination of deliveries of natural gas exist with respect to natural gas no longer subject to NGA regulation. In the case of first sales of natural gas not previously committed or dedicated to interstate commerce or exempted from NGA regulation, tariff filings and rate increase applications are dispensed with. (Of course, specific requirements for filing to establish the right to col-

lect the maximum lawful price levels exist under the regulations and annual reporting will be required under the NGPA in many instances. However, the nature of these filings, which are in many cases one-time notification type filings is quite different from the rate filings previously required under the NGA.)

For natural gas which on the date of enactment was committed or dedicated but which is exempt from the NGA under section 601(a)(1) of the NGPA, there are substitute mechanisms for NGA section 7(b) abandonment authorization. These substitute provisions, intended to provide a degree of certainty to purchasers dependent upon a predictable natural gas supply, are found in section 315 of the NGPA. The Commission has not attempted to implement these sections in the initial implementing regulations. It is our intent to do so in the near future. That section gives the Commission dual authority to establish by rule or order the minimum duration of any contract (other than an existing contract) for the purchase of natural gas and to require by rule the right of first refusal with respect to any gas committed or dedicated to interstate commerce before the date of enactment if such gas is high cost gas, new natural gas or natural gas produced from any new, onshore production well.

Indirectly, NGA regulation is affected by the operation of section 601(b) and (c) of the NGPA. Section 601(b) provides that any amount paid in any first sale of natural gas shall be deemed to be just and reasonable if such amount does not exceed the maximum lawful ceilings established by the NGPA or if there is no maximum lawful price applicable by reason of elimination of price controls. Section 601(c), the guaranteed pass-through provision, states that the Commission may not deny, or condition, the grant of any certificate under section 7 of the NGA based upon the amount paid in any sale of natural gas if the amount paid meets the stand-

ards of section 601(b) and is, therefore, by statutory fiat, just and reasonable. Additionally, the Commission may only deny the recovery by any interstate pipeline of any amount paid with respect to the purchase of natural gas under section 601(b) to the extent the Commission determines that the amount paid was excessive due to fraud, abuse, or similar grounds.

Finally, included in the implementing regulations are provisions covering certain transportation arrangements by both interstate and intrastate pipelines. Provision is made for intrastate pipeline sales and for the assignment of natural gas excess to their requirements. Also, the Commission has revised its regulations previously applicable to emergency transactions and revised the procedure and the standards for emergency sales of natural gas for this winter's heating season.

GENERAL OUTLINE OF IMPLEMENTING REGULATIONS

The interim regulations add two new subchapters to the Commission's regulations in Chapter 1 of Title 18. New Subchapter H (Parts 270 through 276) contains the new producer regulations under the NGPA. Part 270 sets forth general rules applicable to the entire subchapter. Maximum lawful prices under NGPA sections 102 through 109 are implemented in Part 271. Part 273 provides for interim collections and refunds, while determinations of eligibility by state and federal agencies and Commission review of those determinations are provided for under Parts 274 and 275. Finally, Part 276 covers reports.

* * * *

II. SUMMARY OF PROPOSED REGULATIONS

PART 270

Part 270 prescribes rules and definitions that apply to Subchapter H. Subpart A contains the general rules

and definitions, and Subpart B contains special rules which relate to sales made under particular conditions.

• • • •

Section 270.102 contains definitions. Paragraph (a) provides that unless further defined, terms defined in the NGPA have the same meaning for purposes of these regulations as they do under the NGPA.

The definitions provided under paragraph (b) include basic terms used throughout the regulations and particular terms, such as "production in commercial quantities," "crude oil," "surface location," "intrastate contract," "successor to an intrastate contract," and "intrastate rollover contract," used in more than one subpart. Two of these definitions differ from those which were first proposed: that for "Btu," and that for "production in commercial quantities."

The definition of "Btu," found in clause (2) of paragraph (b), has been amended to conform it to § 270.204. This was done in response to those comments which pointed out a discrepancy between these two sections.

• • • •

III. PUBLIC PROCEDURE

Subchapters H and I of Title 18 were published in the Federal Register as a notice of proposed rulemaking at 43 FR 53270 on November 15, 1978. That proposal included the following description of the procedures the Commission had applied and would apply to the promulgation of final regulations implementing the Natural Gas Policy Act:

> Although the NGPA was not enacted until November 9, 1978, most of its provisions become effective on December 1, 1978. On that date, persons affected by the Act, including a large portion of the natural gas industry not previously regulated by the Federal government, will be subject to a comprehensive and

complex new regulatory structure. For reasons set out more fully below, regulations implementing the Act must be effective on December 1, 1978, both for guidance to those regulated and to insure compliance with the new law.

When it became apparent that the period between final enactment of the law and its effective date would not provide sufficient time for the normal rulemaking procedures, the Commission established the following schedule and procedures.

The Commission has been meeting in public session since November 1, 1978, in order to discuss regulations drafted by the staff to implement the NGPA. Prior to the first meeting, the Commission made copies of the various proposals under consideration available to the public. As successive drafts were completed, these too were released prior to Commission discussion. During all of this period, certain members of the Commission staff were publicly designated as contact persons to answer legal and technical questions concerning the implementation of the Act.

The Commission intends to promulgate interim regulations on November 27, 1978. The interim regulations will be effective on December 1. A 60-day comment period will be afforded with respect to the interim regulations and public hearings will be held. The interim regulations will, after the 60-day period and after all views received since November 1, 1978, have been considered, be modified to the extent such comments and the Commission's experience under the interim regulations indicate the modification is appropriate.

The proposal published today provides for a comment period ending on November 20. The Commission is aware that in view of the significance and

complexity of these regulations, comments will be extensive. To the extent possible, comments received before November 20 will be reviewed and appropriate changes incorporated into the interim regulations. As stated above, all comments will be retained and considered together with the additional comments received during the 60-day period afforded for comments on the interim regulations. The Commission believes that to the extent practicable, the procedures being followed with respect to these regulations are those best designed to insure maximum public participation prior to the time when the interim regulations must be effective.

In establishing this notice and comment procedure, the Commission has considered a number of factors. Most important, as stated above, is the fact that most of the Act's provisions become effective on December 1, 1978, including provisions establishing maximum lawful prices applicable to first sales of natural gas delivered after November 30, 1978. Some of the prices which may be charged for natural gas deliveries under the Act are established by reference to existing prices.

For other categories, pricing determinations must be made by State or Federal agencies with regulatory authority over the production of natural gas. Unless the interim regulations are available on December 1, 1978, members of the public whose sales are governed by provisions of the Act will not be able to ascertain the applicable maximum lawful price governing their sales of natural gas. Indeed, some sellers and transporters of natural gas could unknowingly be in technical violation of the law. Purchasers may be uncertain whether prices requested exceed the prices permitted under the law. Similarly, agencies which must make determinations with respect to eligibility for prices established by

the Act must be made aware of Commission requirements applicable to these determinations, including the manner in which the Commission will review such determinations.

After consideration of the problems associated with any delay in promulgating implementing regulations, the Commission has reached the conclusion that because the regulations must be effective by December 1, 1978, good cause exists to limit as described above notice and public procedure on this proposal. Full notice and public procedure on the proposal at this time, which as a practical matter would result in a delay of the effective date of the regulations beyond the effective date of the NGPA, are impractical and contrary to the public interest. It should be emphasized that all of the procedures described above will provide the fullest possible opportunity for public participation during the entire process leading to the promulgation of final regulations.

CONSIDERATION OF COMMENTS

A substantial number of written comments have been received in response to the notice of proposed rulemaking. In addition, the staff met informally, prior to the close of the comment period, with representatives of state agencies, consumer groups, and the industries affected by the proposed regulations. A notice, describing these meetings and inviting any interested person to meet informally with designated members of the Commission staff was issued on November 17, 1978. Minutes of these informal meetings, together with any written materials presented at these meetings, have been included in the public file. All comments received by the Commission by November 20, 1978, and to the extent possible, comments received after that date, have been considered. In the limited time available to the Commission and its

staff, changes in the regulations have been made. The major changes are noted in Section II of this preamble. The preamble also discusses a number of suggestions made in the comments which have not been incorporated into these regulations.

Because of the time limitation, some changes have been made, generally of a minor nature which are not discussed in the preamble, and the reasons for not adopting some suggestions are not mentioned. To the extent possible, significant changes have been explained. The Commission wishes to emphasize that all comments will be retained and reconsidered with comments received as a result of this publication. Accordingly, suggested changes, deletions or additions, not adopted by the Commission in these rules, will, in light of additional information received in the next 60 days, be re-examined and possibly adopted as amendments to the interim regulations.

ADDITIONAL COMMENTS

In accordance with the procedures described below, the Commission solicits comments on all aspects of these interim regulations. It should be emphasized that the Commission intends to review the regulations in their entirety and make whatever changes it deems appropriate based on the comments already received, additional written comments, the views expressed in public hearings, and experiences under the regulations during the next 60 days.

Interested persons are invited to submit written comments on the regulations to the Office of the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. Comments should reference Docket No. RM79-3 on the outside of the envelope and on all documents submitted to the Commission. To assist the Commission, it is requested that comments identify the section or subpart addressed, state

whether the comments involve technical, legal, or policy matters, and if alternative approaches are suggested, provide proposed implementing language to the extent practicable.

Fifteen copies should be submitted. All comments and related information received by the Commission by January 31, 1979, will be considered prior to promulgation of revisions or amendments to these regulations.

PUBLIC HEARINGS

The Commission intends to hold a series of public hearings on these interim regulations, as required by section 502(b) of the NGPA. For the reasons stated above, however, the Commission finds that it is impracticable to provide an opportunity for oral presentation of data, views and arguments prior to the effective date of the regulations, and waives for 45 days the requirement of prior hearings under section 502(b). The dates and locations of the public hearings will be announced as soon as practicable.

EFFECTIVE DATE

As stated above, the Commission has determined that a delay of the effective date of the regulations beyond the effective date of the Natural Gas Policy Act is impractical and contrary to the public interest. Accordingly, the Commission finds that good cause exists for making the regulations effective on December 1, 1978.

(Natural Gas Act, as amended, 15 U.S.C. 717 *et seq.*, Energy Supply and Environmental Coordination Act, 15 U.S.C. 791 *et seq.*, Federal Energy Administration Act, 15 U.S.C. 761 *et seq.*, Natural Gas Policy Act of 1978, P.L. 95-621, 92 Stat. 3350, Department of Energy Organization Act, P.L. 95-91, E.O. 12009, 42 F.R. 46267)

In consideration of the foregoing, Chapter I of Title 18, Code of Federal Regulations, is amended as set forth below.

By the Commission.

/s/ Lois D. Cashell
LOIS D. CASHELL
Acting Secretary

* * * *

5. Chapter I of Title 18 is amended by adding new Subchapters H and I to read as follows:

SUBCHAPTER H—REGULATION OF NATURAL GAS SALES UNDER THE NATURAL GAS POLICY ACT OF 1978

Part

270 Rules generally applicable to regulated sales of natural gas.

271 Ceiling prices.

272 [Reserved]

273 Collection authority; refunds.

274 Determinations by jurisdictional agencies.

275 Commission determinations and review of jurisdictional agency determinations.

276 Reports.

PART 270—RULES GENERALLY APPLICABLE TO REGULATED SALES OF NATURAL GAS

Subpart A—General Rules and Definitions

Sec.

270.101 Application of ceiling prices to first sales of natural gas.

270.102 Definitions.

270.103 Effective date.

Subpart B—Special Rules

Sec.

270.201 First sale of natural gas subject to differing maximum lawful prices.

270.202 Resales.

270.203 Pipeline or distributor production.

270.204 Btu content per unit volume of natural gas.

270.205 Indefinite price escalator clauses.

Authority: This part is issued under the Natural Gas Policy Act of 1978, P.L. 95-621, 92 Stat. 3350.

* * * *

§ 270.102 *Definitions.*

(a) *NGPA definitions.* Terms defined in the NGPA shall have the same meaning for purposes of this subchapter as they have under the NGPA, unless further defined in this subchapter.

(b) *Subchapter H definitions.* For purposes of this subchapter:

(1) "NGPA" means the Natural Gas Policy Act of 1978.

(2) "British thermal unit" or "Btu" means the quantity of heat required to raise the temperature of one pound avoirdupois of pure water from 58.5 degrees to 59.5 degrees Fahrenheit, determined in accordance with § 270.204.

(3) "MMBtu" means million British thermal units.

* * * *

SUBPART B—SPECIAL RULES

* * * *

§ 270.204 *Btu content per unit volume of natural gas.*

For purposes of determining the number of Btu's per unit volume of natural gas, the Btu content of one cubic foot of natural gas is the number of Btu's produced by the combustion, at constant pressure, of the amount of gas which would occupy a volume of 1.0 cubic foot at a temperature of 60 degrees Fahrenheit, saturated with water vapor and under a pressure equivalent to that of 30.00 inches of mercury at 32 degrees Fahrenheit, and under

standard gravitational force (980.665 centimeters per second squared) with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of the gas and air and when the water formed by combustion is condensed to the liquid state.

* * * *

DC-C-23

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Charles B. Curtis, Chairman;
Georgiana Sheldon,
Matthew Holden, Jr.,
and George R. Hall.

Docket No. RM79-3

INTERIM REGULATIONS IMPLEMENTING THE
NATURAL GAS POLICY ACT OF 1978

ORDER GRANTING IN PART AND DENYING IN PART APPLICATIONS FOR REHEARING OF THE INTERIM REGULATIONS

(Issued April 19, 1979)

On January 3, 1979, the Commission issued Order No. 21 in Docket No. RM79-12, which prescribed a final regulation providing for a rehearing procedure for rules or orders issued under the Natural Gas Policy Act of 1978 (NGPA). Pursuant to the provisions of that regulation eight timely applications [1] were filed seeking rehearing of the interim regulations implementing the NGPA published December 1, 1979, 43 *Fed. Reg.* 56463. Furthermore, one untimely application for rehearing was filed by Belco Petroleum Corporation. In response to such applications, the Commission issued an order on March 2, 1979, granting rehearing solely for purposes of further

[1] The applications were filed by Shell Oil Company, Indicated Intrastate and Interstate Gas Consumers, Indicated Producers, Texasgulf Inc., Monterey Pipeline Company, Kentucky West Virginia Gas Company, Continental Oil Company and Consolidated Gas Supply Corporation.

consideration in the context of the Commission's ongoing process of reviewing public comments on the NGPA interim regulations and issuing final regulations. The March 2 order did indicate, however, that we would give special consideration to the matters raised in the rehearing applications in establishing priorities for the issuance of final regulations.

Consistent with this approach, on March 23, 1979, the Commission issued final regulations under Part 276.[2] Those portions of the subject applications raising issues relative to Part 276 annual reports were considered and acted on by the Commission.

In addition to the Commission's consideration of the applications for rehearing in conjunction with its promulgation of final regulations, we have determined to grant rehearing of section 271.803(b) apart from the issuance of final regulations relative to this section. The application for rehearing by Indicated Producers raises an issue which deserves our immediate attention as set out below.

The table set forth in section 271.803(b) of the interim regulations defines "Nonassociated natural gas" relative to three distinct levels of production from a well. The production level of "50 Mcf or more but less than 60 Mcf" should be changed to read "50 Mcf or more but not more than 60 Mcf". This change will conform the regulations with section 108 of the NGPA which specifically defines stripper well gas as gas from a well which produced nonassociated gas at rate *which does not exceed* an average of 60 Mcf per production day during the preceding 90 day production period. In order to effect this change, the Commission is issuing, simultaneously with this order, an order amending section 271.803(b) of the interim regulations.

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[2] Docket No. RM79-30 (March 23, 1979).

Further, with respect to those applications (or portions thereof) which have not been acted on in conjunction with our promulgation of final regulations, the Commission concludes that such applications for rehearing should be denied insofar as they relate to the interim regulations.

In order to avoid confusion as to the effect of the issuance of final regulations on rehearing applications filed in response to the interim regulations, we believe that some clarification on this point is appropriate.

As noted above, some interested persons petitioned for rehearing of particular aspects of the interim regulations. Others did not, in the apparent belief that they would be able to satisfy any rehearing requirement after the "interim" regulations were succeded by "permanent" regulations. The Commission addressed one aspect of this problem in Order No. 23 concerning its policy toward the effect of NGPA on indefinite escalation clauses in interstate and intrastate gas sales contracts. (mimeo n. 9, p. 8). Because of the inter-relationship between the Natural Gas Act and NGPA, many of the interim regulations concerning interstate gas sales have been issued under both statutes. The Commission must assure that no interested person is denied the right to seek rehearing under Section 19(b) of the Natural Gas Act and Section 506 of NGPA, that the rehearing requirement under those statutes is satisfied insofar as it is a procedural prerequisite to judicial review, and must also provide, for the Commission's benefit, an administrative procedure that enables the Commission to take a last look at its action in the light of particularized claims of legal error or factual misapprehension. Accordingly, the Commission has endeavored to devise a treatment for rehearing applications of the interim and permanent regulations that is practical in terms of expediting administrative finality and minimizing procedural burdens, and fair in terms of assuring that all interested persons are

heard and are not improvidently cut off from their right to seek judicial review.

First, the Commission concludes that those parties who petitioned for rehearing of the interim regulations, and whose petitions have been subsequently denied, may immediately seek judicial review of those regulations with respect to any matters raised in such petitions for the period the interim regulations are in effect. As noted in Order No. 21 (rehearing procedures for the NGPA), because there was uncertainty as to the necessity for rehearing under NGPA, and no procedure existed until Order No. 21 was issued, all persons were allowed a period to and including February 3, 1979, during which to file petitions for rehearing of the interim regulations.[3] All persons have thus had a reasonable opportunity to seek rehearing of the interim rules for the period they will be in effect, i.e., until superseded by particular permanent rules.

Second, any party who did not seek rehearing of the interim regulations nevertheless may, and, to obtain judicial review of any permanent rules, must separately petition for rehearing with respect to those rules.

Third, insofar as the permanent rules incorporate provisions of the interim rules as to which rehearing has been denied, no further petition by the petitioning party is required because the underlying issues have already been thoroughly aired. The Commission will consider the earlier petitions as if filed with respect to the permanent rules and to the extent the rule is unchanged, the petitions shall be deemed denied.

Fourth, if the permanent rule contains modifications of the interim rule all dissatisfied persons must apply for rehearing of the modifications, whether or not rehearing of the interim rules was sought, before judicial review becomes available.

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[3] Docket No. RM79-12 (January 3, 1979).

The foregoing procedure will avoid needless duplication of rehearing petitions filed by the same person insofar as particular provisions of the interim and permanent regulations are the same; will provide the interested persons and the Commission with a rehearing procedure directed at the permanent regulations that contain modifications of the interim regulations; will permit judicial review of the interim regulations for the period they are in effect; and will provide those who postponed seeking rehearing of the interim regulations with an opportunity to do so with respect to the permanent regulations as they are issued, and thereafter to pursue judicial remedies.

Commission orders:

That the subject applications for rehearing filed in Docket No. RM79-3 are granted in part and denied in part as is specifically set forth above.

By the Commission.

[SEAL]

LOIS D. CASHELL,
Acting Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

[18 CFR Parts 2, 157, 270, 271,
273, 274, 275, 276, 284]

[Docket No. RM79-3]

REGULATIONS IMPLEMENTING THE NATURAL GAS POLICY ACT OF 1978

AGENCY: Federal Energy Regulatory Commission

ACTION: Notice of Proposed Rulemaking

SUMMARY: The Natural Gas Policy Act of 1978 (NGPA), enacted November 9, 1978, takes effect with respect to certain first sales of natural gas delivered on or after December 1, 1978. The new statutory provisions relating to pricing of natural gas and other issues must, therefore, be implemented by regulation by that date. These proposed implementing regulations are being issued for a brief public comment period prior to promulation of interim regulations. The Commission will then receive comments on the interim regulations for 60 days and will revise the interim regulations as appropriate.

DATE: Written comments by November 20, 1978.

ADDRESS: Office of the Secretary, Federal Energy Regulatory Commission, 825 N. Capitol St., N.E., Washington, D.C. 20426, (Reference Docket No. RM79-3).

FOR FURTHER INFORMATION CONTACT:

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I. INTRODUCTION

On November 9, 1978, the Natural Gas Policy Act of 1978 (NGPA) was signed into law. By passage of the NGPA, Congress has mandated a new legislative framework for the regulation of most facets of the natural gas industry. The new law affects sales, transmission and distribution of natural gas. The previously controlling federal regulatory statute, the Natural Gas Act (NGA) has in many respects been limited, replaced or superseded by the NGPA.

A primary effect of the NGPA is the substitution of a series of specific statutory maximum price levels applicable to discrete types of "first sales" of natural gas for the previously established system of price regulation of interstate sales of natural gas which had been grounded in a cost-based methodology. An important distinction between producer regulation under the NGA and the NGPA is the expansion of the Federal Energy Regulatory Commission's (Commission) jurisdictional scope to encompass not only sales made in interstate but in intrastate commerce as well. Under the NGPA, all first sales of natural gas are controlled by the maximum statutory ceiling rates and as a result, it is unlawful for any person to sell natural gas at a price in excess of the statutory maximum regardless of whether the sale occurs in the inter- or intrastate market.

The Commission wishes to call specific attention to the provisions of section 101(b)(g) of the NGPA. The Congress, by that provision, emphasizes and makes clear that the maximum lawful prices under the NGPA are *ceiling* prices and do not supersede or nullify the effectiveness of any contractual agreement to pay a lower price. Therefore, the Commission cautions producers not to assume entitlement to any NGPA ceiling price which is higher than their contract prices.

The Commission is directed to administer essentially all of the NGPA and is authorized to perform any and

all acts and to prescribe and issue such rules and orders as it finds necessary or appropriate to carry out its functions under the NGPA. The proposed regulations, contained in this notice, mark the first step in carrying out the basic responsibilities for implementation and administration of the Act and provide a mechanism for transition from the NGPA regulating regime to the NGPA scheme.

The NGPA is divided into six titles:

I. Pricing

A. Price Controls Applicable to Sales of Natural Gas

B. Decontrol of Certain Natural Gas Prices

II. Incremental Pricing

III. Additional Authorities and Requirements

A. Emergency Authorities

B. Other Authorities and Requirements

IV. Natural Gas Curtailment Policies

V. Administration, Enforcement, and Review

VI. Coordination with the Natural Gas Act, Effect on State Laws

The regulations proposed here do not implement all titles under the NGPA. Rather, the regulations propose to deal with those areas demanding the most expeditious treatment.

This first group of regulations is designed to set in motion the new scheme for pricing of first sales of natural gas and to provide mechanisms for implementation of provisions of the NGPA covering certain arrangements for transportation of natural gas. However, before setting out in detail a full description of the specific regulations proposed, a summary of the most salient features of the

NGPA, the effect on regulation under the NGA, and a capsule description of the implementing regulations and corollary modifications of regulations under the NGA, may be useful.

THE LEGISLATIVE SCHEME OF THE NGPA

The nature and scope of Commission regulation of producer sales under the NGPA has been substantially transformed from utility-type regulation of a limited market to what is essentially price regulation of an entire national market. Under the scheme set up by the NGPA, there exist two major categories of first sales: those requiring a prior determination of eligibility to be made by a jurisdictional federal or state agency before collection of the maximum lawful price and those not explicitly requiring such a determination. A decision as to whether a first sale falls into a category requiring a determination is fundamental. A decision to seek a determination triggers quite different regulatory consequences than an opposite conclusion.

Although the Commission may be called upon to return to the cost-based, just and reasonable methodology within the meaning of the NGA in establishing rates in excess of the NGPA ceiling prices, the basic administration of the pricing provisions of the NGPA will be undertaken from an entirely different perspective. The Commission will no longer inquire into producer costs or set permissible rates of return for producers. Instead, the Commission's focus will center on whether geological information, production history, field records, prior contractual relationships and information of a similar nature support the categorization for pricing purposes claimed by producers.

Another crucial factor in anticipating what regulatory treatment will be accorded producer sales of natural gas is whether gas is "committed or dedicated" for purposes

of NGA regulation. The limitations on NGA regulation as a result of enactment of the NGPA will be addressed in another section of this preamble. However, the distinction between gas which is deemed to be subject to continuing regulation under the Natural Gas Act and gas which falls solely within the NGPA regulatory format is significant and affects both pricing and non-pricing regulation of producer matters.

For categories of gas requiring a prior determination by a federal or state agency, the Commission's function is more in the nature of an appellate body, reviewing, on a substantial evidence basis, the factual determinations of the appropriate jurisdictional agency with the right of disapproval in the event the initial determination is not adequately substantiated. The Commission rules reflect this role and prescribe the basic and minimum factual foundation necessary to meet its review responsibilities without directly interposing the Commission into the procedural functioning of the jurisdictional agency. The review process of initial determinations begins when notice is received of a jurisdictional agency's determination with the appropriate supporting material specified in Part 274 of the proposed regulations. In the absence of a reversal, the determination of the jurisdictional agency becomes final and no longer subject to review unless based on any untrue statement of material fact or upon any omission of material fact which omission was misleading.

Categories of first sales explicitly requiring that a determination as to qualification to collect the maximum lawful price be made by either a jurisdictional federal or state agency are:

- Section 102 which sets a maximum lawful price for first sales of new natural gas (gas produced from a new lease on the Outer Continental Shelf (OCS) or certain new onshore wells) and gas produced from any old OCS lease which was from a reservoir discovered after July 27, 1976;

- Section 103 which sets a maximum price for first sales of new onshore production wells;
- Section 107 which sets a maximum lawful price for first sales of high cost natural gas including gas produced from geopressurized brine, coal, seams, Devonian shale or gas produced under other conditions the FERC determines to present "extraordinary" risks or costs; and
- Section 108 which sets the maximum lawful price for first sales of stripper well natural gas.

An essential element in the regulatory system established with respect to categories requiring a prior determination is the provision for interim collection procedures by producers awaiting a final determination or the outcome of a review of such determination. The Commission has a concomitant power to require refunds from the producer if the gas eventually qualifies for a lower price. Section 503(e) sets out this collection and refunding procedure.

Part 273 of the regulations states the prerequisites for interim collection. First, the Commission has established a "transitional rule" to permit the collection by producers of the section 109 price if a producer files for a determination by March 1, 1979. Additional rules are established for interim collection pending and following a state or federal agency determination.

Those first sales of natural gas not requiring a prior determination to be made by a jurisdictional federal or state agency are tied to previously existing contractually set prices or price levels established by the Federal Power Commission or this Commission. First sales not requiring a prior determination under the NGPA are:

- Section 104 which incorporates by reference the just and reasonable rates established under the NGA for first sales of gas committed or dedicated to interstate

commerce on the day before the date of enactment of the NGPA;

- Section 105 which establishes maximum lawful prices for first sales under existing contracts of natural gas not previously committed or dedicated to interstate commerce; and
- Section 106 which establishes maximum lawful prices for first sales under interstate and intrastate rollover contracts;
- Section 109 which establishes the maximum lawful price for first sales of natural gas from the Prudhoe Bay in Alaska and categories of gas not otherwise covered by other sections of the NGPA.

The Commission has general administrative and enforcement authority under the NGPA and the NGA to order refunds in cases where the maximum lawful price level has been improperly exceeded.

EFFECT OF THE NGPA UPON CONTINUED NGA REGULATION

As stated previously, natural gas which remains committed or dedicated to interstate commerce on the day before the date of enactment of the NGPA or which is not specifically exempted from the jurisdictional consequences of commitment or dedication by the NGPA, remains subject to all the non-price regulatory requirements of the NGA. An important aspect of continued NGA regulation is the requirement that a producer file an abandonment application with the FERC pursuant to section 7(b) of the NGA before terminating service to the interstate market or before abandonment of facilities used to render interstate service. Additionally, although price regulation of first sales by producers of gas committed or dedicated is now governed by the NGPA, sections 104 and 106(a) are grounded in previously established rates under

the NGA. As a result, producers wishing to establish their right to collect under these sections will be required to make a filing under their rate schedules under the NGA. On November 16, 1978, the Commission intends to amend its previously existing filing requirements to provide new procedures governing these rate increase filings.

If gas is not committed or dedicated to interstate commerce as defined in section 2(18) or is exempted from the jurisdiction of the NGA under section 601(a)(1)(B) as high cost natural gas, new natural gas, or natural gas produced from any new onshore production well, the prior framework of utility-type regulation under the NGA no longer applies.

If natural gas sales are freed from the requirements of the NGA, several adjuncts to NGA regulation are obviated. First, there is no longer any necessity for a producer to seek certification of the sale as serving the public convenience and necessity. The replacement for this requirement under the NGPA is limited to the state determination mechanism and the pricing limits established in the NGPA. New sales in interstate commerce no longer require certification as a prerequisite to commencement of deliveries. Nor does the requirement for abandonment authorization before termination of deliveries of natural gas exist with respect to natural gas no longer subject to NGA regulation. In the case of first sales of natural gas not previously committed or dedicated to interstate commerce or exempted from NGA regulation, tariff filings and rate increase applications are dispensed with. (Of course, specific requirements for filing to establish the right to collect the maximum lawful price levels exist under the regulations and annual reporting will be required under the NGPA in many instances. However, the nature of these filings, which are in many cases one-time notification type filings is quite different from the rate filings previously required under the NGA.)

For natural gas which on the date of enactment was committed or dedicated but which is exempted from the NGA under section 601(a)(1) of the NGPA, there are substitute mechanisms for NGA section 7(b) abandonment authorization. These substitute provisions, intended to provide a degree of certainty to purchasers dependent upon a predictable natural gas supply, are found in section 315 of the NGPA. The Commission has not attempted to implement these sections in the initial implementing regulations. It is our intent to do so in the near future. That section gives the Commission dual authority to establish by rule or order the minimum duration of any contract (other than an existing contract) for the purchase of natural gas and to require by rule right of first refusal with respect to any gas committed or dedicated to interstate commerce before the date of enactment if such gas is high cost gas, new natural gas or natural gas produced from any new, onshore production well.

Indirectly, NGA regulation is affected by the operation of section 601(b) and (c) of the NGPA. Section 601(b) provides that any amount paid in any first sale of natural gas shall be deemed to be just and reasonable if such amount does not exceed the maximum lawful ceilings established by the NGPA or if there is no maximum lawful price applicable by reason of elimination of price controls. Section 601(c), the guaranteed passthrough provision, states that the Commission may not deny, or condition the grant of any certificate under section 7 of the NGA based upon the amount paid in any sale of natural gas if the amount paid meets the standards of section 601(b) and is, therefore, by statutory fiat, just and reasonable. Additionally, the Commission may only deny the recovery by any interstate pipeline of any amount paid with respect to the purchase of natural gas under section 601(b) to the extent the Commission determines that the amount paid was excessive due to fraud, abuse, or similar grounds.

Finally, included in the implementing regulations are provisions covering certain transportation service by both interstate and intrastate pipelines. Provision is made for intrastate pipeline sales and for the assignment of natural gas excess to their requirements. Also, the Commission has revised its regulations previously applicable to emergency transactions and revised the procedure and the standards for emergency sales of natural gas for this winter's heating season.

GENERAL OUTLINE OF IMPLEMENTING REGULATIONS

The proposed regulations add two new subchapters to the Commission's regulations in Chapter I of Title 18. New Subchapter H (Parts 270 through 276) contains the new producer regulations under the NGPA. Part 270 sets forth general rules applicable to the entire subchapter. Maximum lawful prices under NGPA sections 102 through 109 are implemented in Part 271. Part 273 provides for interim collections and refunds, while determinations of eligibility by state and federal agencies and Commission review of those determinations are provided for under Parts 274 and 275. Finally, Part 276 covers reports.

* * * *

To assist the reader and guide comment, a brief description of each part and subpart is included as a preamble to the text of the regulation. The statutory requirements that certain of our implementing regulations be fashioned and made effective on December 1, 1978, has not permitted the Commission to provide as full and detailed an explanation of its regulations as we would have liked. However, before any regulation is placed into effect (with or without modification) we expect to be able to add greater substance to the explanatory materials, guided by the written comments of interested parties received in response to this invitation for views.

II. SUMMARY OF PROPOSED REGULATIONS

PART 270

Part 270 prescribes rules and definitions that apply to Subchapter H. Subpart A contains the general rules and definitions. Subpart B contains special rules.

• • • •

Section 270.102(a) provides that terms defined in the NGPA have the same meaning for purposes of these regulations unless further defined. Some terms used in individual sections or subparts are defined therein. Those used in more than one Subpart are defined in § 270.102 (b).

• • • •

Finally, § 270.204 presents the technical information necessary to determine the number of British thermal units (Btu's) per unit volume of natural gas. This is necessary because maximum lawful prices for first sales of natural gas are stated in terms of dollars per million Btu's.

• • • •

III. PUBLIC PROCEDURE

Although the NGPA was not enacted until November 9, 1978, most of its provisions become effective on December 1, 1978. On that date, persons affected by the Act, including a large portion of the natural gas industry not previously regulated by the Federal government, will be subject to a comprehensive and complex new regulatory structure. For reasons set out more fully below, regulations implementing the Act must be effective on December 1, 1978, both for guidance to those regulated and to insure compliance with the new law.

When it became apparent that the period between final enactment of the law and its effective date would not provide sufficient time for the normal rulemaking pro-

cedures, the Commission established the following schedule and procedures.

The Commission has been meeting in public session since Novemmber 1, 1978, in order to discuss regulations drafted by the staff to implement the NGPA. Prior to the first meeting, the Commission made copies of the various proposals under consideration available to the public. As successive drafts were completed, these too were released prior to Commission discussion. During all of this period, certain members of the Commission staff were publicly designed as contact persons to answer legal and technical questions concerning the implementation of the Act.

The Commission intends to promulgate interim regulations on November 27, 1978. The interim regulations will be effective on December 1. A 60-day comment period will be afforded with respect to the interim regulations and public hearings will be held. The interim regulations will, after the 60-day period and after all views received since November 1, 1978, have been considered, be modified to the extent such comments and the Commission's experience under the interim regulations indicate that modification is appropriate.

The proposal published today provides for a comment period ending on November 20. The Commission is aware that in view of the significance and complexity of these regulations, comments will be extensive. To the extent possible, comments received before November 20 will be reviewed and appropriate changes incorporated into the interim regulations. As stated above, all comments will be retained and considered together with the additional comments received during the 60-day period afforded for comments on the interim regulations. The Commission believes that to the extent practicable, the procedures being followed with respect to these regulations are those best designed to insure maximum public participation

prior to the time when the interim regulations must be effective.

In establishing this notice and comment procedure, the Commission has considered a number of factors. Most important, as stated above, is the fact that most of the Act's provisions become effective on December 1, 1978, including provisions establishing maximum lawful prices applicable to first sales of natural gas delivered after November 30, 1978. Some of the prices which may be charged for natural gas deliveries under the Act are established by reference to existing prices. For other categories, pricing determinations must be made by State or Federal agencies with regulatory authority over the production of natural gas. Unless the interim regulations are available on December 1, 1978, members of the public whose sales are governed by provisions of the Act will not be able to ascertain the applicable maximum lawful price governing their sales of natural gas. Indeed, some sellers and transporters of natural gas could unknowingly be in technical violation of the law. Purchasers may be uncertain whether prices requested exceed the prices permitted under the law. Similarly, agencies which must make determinations with respect to eligibility for prices established by the Act must be made aware of the Commission requirements applicable to these determinations, including the manner in which the Commission will review such determinations.

After consideration of the problems associated with any delay in promulgating implementing regulations, the Commission has reached the conclusion that because the regulations must be effective by December 1, 1978 good cause exists to limit as described above notice and public procedure on this proposal. Full notice and public procedure on the proposal at this time, which as a practical matter would result in a delay of the effective date of the regulations beyond the effective date of the NGPA, are impractical and contrary to the public interest. It should

be emphasized that all of the procedures described above will provide the fullest possible opportunity for public participation during the entire process leading to the promulgation of final regulations.

IV. WRITTEN COMMENTS

Interested persons are invited to submit written comments on the proposed regulations to the Office of the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. Comments should reference Docket No. RM79-3 on the outside of the envelope and on all documents submitted to the Commission. In view of the short comment period available on these proposed regulations, and in order that the Commission be able to take into account as many comments as possible, the Commission requests that persons submitting comments assist in three ways. First, persons should identify specifically the section or subpart they are addressing. Second, comments should clearly state whether they involve technical, policy or legal matters. Finally, where comments urge a different approach from one presented, specific alternative language should be proposed to the extent practicable.

Fifteen (15) copies should be submitted. To the extent possible, all comments and related information received by the Commisison by November 20, 1978, will be considered prior to the promulgation of interim regulations on November 27, 1978. All comments will be retained and considered prior to the promulgation of final regulations.

(Natural Gas Act, as amended, 15 U.S.C. 717 *et seq.*, Energy Supply and Environmental Coordination Act, 15 U.S.C. 791 *et seq.*, Federal Energy Administration Act, 15 U.S.C. 761 *et seq.*, Natural Gas Policy Act of 1978, P.L. ———, Department of Energy Organization Act, P.L. 95-91, E.O. 12009, 42 F.R. 46267)

In consideration of the foregoing, it is proposed to amend Chapter I of Title 18, Code of Federal Regulations as set forth below.

By the Commission.

/s/ Kennth F. Plumb
KENNETH F. PLUMB
Secretary

* * * *

• • • •

3. Chapter I of Title 18 is amended by adding new Subchapters H and I to read as follows:

SUBCHAPTER H—PRODUCER REGULATION UNDER NATURAL GAS POLICY ACT OF 1978

Part

270—Rules generally applicable to producer regulation.

271—Ceiling prices.

272—[Reserved]

273—Collection authority; refunds.

274—Determinations by jurisdictional agencies.

275—Commission determinations and review of jurisdictional agency determinations.

276—Reports.

PART 270—RULES GENERALLY APPLICABLE TO PRODUCER REGULATION

• • • •

§ 270.102 *Definitions.*

(a) *NGPA definitions.* Terms defined in the NGPA shall have the same meaning for purposes of this subchapter as they have under the NGPA, unless further defined in this subchapter.

(b) *Subchapter H definitions.* For purposes of this subchapter:

(1) "NGPA" means the Natural Gas Policy Act of 1978.

(2) "British thermal unit" or "Btu" means the quantity of heat required to raise the temperature of one pound avoirdupois of pure water from 58.5 degrees to 59.5 degrees Fahrenheit. For the purposes of this subchapter, the standard for measuring the heat value of

natural gas is Btu's per cubic foot saturated with water at 60 degrees Fahrenheit and 14.73 psia.

(3) "MMBtu" means million British thermal units.

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SUBPART B—SPECIAL RULES

Sec.

270.201 First sales of natural gas subject to differing maximum lawful prices.

270.202 Resales.

270.203 First sales of natural gas attributable to pipeline or distributor production.

270.204 Btu content per unit volume of natural gas.

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§ 270.204 *Btu content per unit, volume of natural gas.*

For purposes of determining the number of Btu's per unit volume of natural gas, the Btu content of one cubic foot of natural gas is the number of Btu's produced by the combustion, at constant pressure, of the amount of gas which would occupy a volume of 1.0 cubic foot at a temperature of 60 degrees Fahrenheit, saturated with water vapor and under a pressure equivalent to that of 30.00 inches of mercury at 32 degrees Fahrenheit, and under standard gravitational force (980.665 centimeters per second squared) with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of the gas and air and when the water formed by combustion is condensed to the liquid state.

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APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

No. 81-1690

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

MOBIL OIL CORPORATION, ET AL.,
GENERAL AMERICAN OIL COMPANY OF TEXAS,
PHILLIPS PETROLEUM COMPANY,
PENNZOIL COMPANY,
MISSISSIPPI RIVER TRANSMISSION CORP.,
SHELL OIL COMPANY,
EXXON CORPORATION,
LACLEDE GAS COMPANY,
GETTY OIL COMPANY,
LOUISIANA LAND & EXPLORATION COMPANY,
ASSOCIATED GAS DISTRIBUTORS,
NORTHERN NATURAL GAS COMPANY,
TEXAS GAS TRANSMISSION CORPORATION,
TEXACO, INC.,
TENNECO OIL COMPANY,
HOUSTON OIL AND MINERALS CORPORATION,
GULF OIL CORPORATION,
PLACID OIL COMPANY,
AMINOIL USA, INC., ET AL.,
Intervenors

No. 81-1680

MICHIGAN WISCONSIN PIPELINE COMPANY,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

MOBIL OIL CORPORATION, ET AL.,
AMOCO PRODUCTION COMPANY,
GENERAL AMERICAN OIL COMPANY OF TEXAS,
PHILLIPS PETROLEUM COMPANY,
PENNZOIL COMPANY,
EXXON CORPORATION,
SHELL OIL COMPANY,
TENNECO OIL COMPANY,
UNION OIL COMPANY OF CALIFORNIA,
LOUISIANA LAND & EXPLORATION COMPANY,
GETTY OIL COMPANY,
ASSOCIATED GAS DISTRIBUTORS,
LACLEDE GAS COMPANY,
SUN OIL COMPANY,
ARCO OIL & GAS COMPANY,
PLACID OIL COMPANY,
TEXACO, INC.,
GULF OIL CORPORATION,
Intervenors

No. 81-1691

TRANSCONTINENTAL GAS PIPELINE CORPORATION,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

MOBIL OIL CORPORATION,
GENERAL AMERICAN OIL COMPANY OF TEXAS,
PHILLIPS PETROLEUM COMPANY,
PENNZOIL COMPANY,

SHELL OIL COMPANY,
ASSOCIATED GAS DISTRIBUTORS,
GETTY OIL COMPANY,
LOUISIANA LAND & EXPLORATION COMPANY,
TEXACO, INC.,
EXXON CORPORATION,
SUN OIL COMPANY,
TENNECO OIL COMPANY,
HOUSTON OIL AND MINERALS CORPORATION,
GULF OIL CORPORATION,
PLACID OIL COMPANY,
Intervenors

No. 81-1692

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

MOBIL OIL CORPORATION, ET AL.,
GENERAL AMERICAN OIL COMPANY OF TEXAS,
PHILLIPS PETROLEUM COMPANY,
PENNZOIL COMPANY,
SHELL OIL COMPANY,
LACLEDE GAS COMPANY,
ASSOCIATED GAS DISTRIBUTORS,
GETTY OIL COMPANY,
LOUISIANA LAND & EXPLORATION COMPANY,
TEXACO, INC.,
SUN OIL COMPANY,
CHEVRON, USA,
EXXON CORPORATION,
TENNECO OIL COMPANY,
HOUSTON OIL AND MINERALS CORPORATION,
GULF OIL CORPORATION,
PLACID OIL COMPANY,
Intervenors

No. 81-1696

LONE STAR GAS COMPANY,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

GENERAL AMERICAN OIL COMPANY OF TEXAS,
PHILLIPS PETROLEUM COMPANY,
PENNZOIL COMPANY,
SHELL OIL COMPANY,
LACLEDE GAS COMPANY,
LOUISIANA LAND & EXPLORATION COMPANY,
GETTY OIL COMPANY,
ASSOCIATED GAS DISTRIBUTORS,
VALERO TRANSMISSION COMPANY,
TEXACO, INC.,
EXXON CORPORATION,
SUN OIL COMPANY,
TENNECO OIL COMPANY,
HOUSTON OIL AND MINERALS CORPORATION,
GULF OIL CORPORATION,
PLACID OIL COMPANY,
PANHANDLE EASTERN PIPE LINE CO., ET AL.,
Intervenors

No. 81-1802

LACLEDE GAS COMPANY,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

No. 82-1004

LONE STAR GAS COMPANY,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

EXXON CORPORATION,
CONOCO INC.,
GENERAL AMERICAN OIL COMPANY OF TEXAS,
PENNZOIL COMPANY,
TENNECO OIL COMPANY,
UNION OIL COMPANY OF CALIFORNIA,
GETTY OIL COMPANY,
AMINOIL USA, INC.,
GULF OIL CORPORATION,
TEXACO, INC.,
MOBIL OIL CORPORATION, ET AL.,
HOUSTON OIL AND MINERALS CORPORATION,
SHELL OIL COMPANY,
ATLANTIC RICHFIELD COMPANY,
SUN EXPLORATION AND PRODUCTION CO.,
Intervenors

No. 82-1177

ASSOCIATED GAS DISTRIBUTORS,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

Petition for Review of Orders of the
Federal Energy Regulatory Commission

Before: Robinson, Chief Judge, Mikva and Scalia, Circuit Judges

JUDGMENT

These causes came on to be heard on a petition for review of orders of the Federal Energy Regulatory Commission, and were argued by counsel. On consideration of the foregoing, it is

ORDERED, by this Court, that the petition for review filed herein by Lone Star Gas Company, designated appeal No. 81-1696, is dismissed for lack of jurisdiction. And it is further

ORDERED and ADJUDGED, by this Court, that the final rule of the Federal Energy Regulatory Commission, being reviewed herein, is vacated. Both the dismissal of the petition for review in appeal No. 81-1696 and the vacation of the final rule on review herein are in accordance with the opinion for the Court filed herein this date.

Per Curiam

For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: August 9, 1983.

Opinion for the Court filed by Circuit Judge Mikva.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

No. 81-1690

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

MOBIL OIL CORPORATION, *et al.*
GENERAL AMERICAN OIL COMPANY OF TEXAS, *et al.*
Intervenors

And Consolidated Cases

[Filed Oct. 19, 1983]

Before: Robinson, Chief Judge, Mikva and Scalia, Circuit Judges

ORDER

On consideration of the Petitions for Rehearing of Shell Oil Company and Texaco, Inc., Exxon Corporation, et al., Producers Amoco Production Co. et al. and Respondent Federal Energy Regulatory Commission, it is

ORDERED by the Court that the Petitions for Rehearing are denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

No. 81-1690

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

MOBIL OIL CORPORATION, *et al.*
GENERAL AMERICAN OIL COMPANY OF TEXAS, *et al.*
Intervenors

And Consolidated Cases

[Filed Oct. 19, 1983]

Before: Robinson, Chief Judge, Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

ORDER

The Suggestions for Rehearing *En Banc* of Shell Oil Company and Texaco, Inc., Exxon Corporation, et al., Producers Amoco Production Co. et al. and Respondent Federal Energy Regulatory Commission have been circulated to the full court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court en banc that the aforesaid suggestions are denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judges Wright, Tamm, Bork and Starr did not participate in this Order.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

No. 81-1690

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION
Respondent

MOBIL OIL CORPORATION, *et al.*
Intervenors

And Consolidated Cases No. 81-1680,
81-1691, 81-1692, 81-1693, 81-1695,
81-1696, 81-1802, 82-1004, 82-1177

[Filed Oct. 25, 1983]

ORDER

On consideration of the Motions of Intervenors Amoco Production Company, et al. to dismiss the petitions for review and to vacate opinion and judgment in cases no. 81-1802 and 82-1177, and to vacate the opinion and judgment in part, the responses and the reply of Intervenors, it is

ORDERED by the Court that the aforesaid motions are denied.

Per Curiam

For The Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

No. 81-1690

INTERSTATE NATURAL GAS ASS'N OF AMERICA
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

MOBIL OIL CORPORATION, *et al.*,
GENERAL AMERICAN OIL COMPANY OF TEXAS,
PHILLIPS PETROLEUM COMPANY,
PENNZOIL COMPANY,
MISSISSIPPI RIVER TRANSMISSION CORP.,
SHELL OIL COMPANY
EXXON CORPORATION
LACLEDE GAS COMPANY
GETTY OIL COMPANY,
LOUISIANA LAND & EXPLORATION COMPANY,
ASSOCIATED GAS DISTRIBUTORS,
NORTHERN NATURAL GAS COMPANY
TEXAS GAS TRANSMISSION CORPORATION
TEXACO, INC.,
TENNECO OIL COMPANY
HOUSTON OIL AND MINERALS CORPORATION
GULF OIL CORPORATION,
Intervenors

And Consolidated Cases

[Filed Nov. 4, 1983]

Before: Robinson, Chief Judge, Mikva and Scalia, Circuit Judges

ORDER

It is ORDERED by the Court that the opinion of the Court of August 9, 1983 is amended as follows:

from the second line of page thirty-three(33) delete the following:

all of the

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX E

NATURAL GAS POLICY ACT OF 1978

15 U.S.C. § 3301, *et seq.*

Section 2(29), 15 U.S.C. § 3301(29):

> MCF.—The term "Mcf", when used with respect to natural gas, means 1,000 cubic feet of natural gas measured at a pressure of 14.73 pounds per square inch (absolute) and a temperature of 60 degrees Fahrenheit.

Section 2(30), 15 U.S.C. § 3301(30):

> BTU.—The term "Btu" means British thermal unit.

Section 102, 15 U.S.C. § 3312:

(a) APPLICATION.—The maximum lawful price computed under subsection (b) shall apply to any first sale of natural gas delivered during any month in the case of—

> (1) new natural gas; and
>
> (2) natural gas produced from any old lease on the Outer Continental Shelf and qualifying under subsection (d) for the new natural gas ceiling price.

(b) MAXIMUM LAWFUL PRICE.—The maximum lawful price under this section for any month shall be—

> (1) $1.75 per million Btu's, in the case of April 1977; and
>
> (2) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this subsection for the preceding month multiplied by the monthly equivalent of a factor equal to the sum of—

(A) the annual inflation adjustment factor applicable for such month; plus

(B) (i) .035, in the case of any month beginning before April 20, 1981; or

(ii) .04, in the case of any month beginning after April 20, 1981.

(c) DEFINITION OF NEW NATURAL GAS.—

(1) GENERAL RULE.—For the purposes of this section, the term "new natural gas" means each of the following categories of natural gas:

(A) NEW OCS LEASES.—Natural gas determined in accordance with section 503 to be produced from a new lease on the Outer Continental Shelf.

(B) NEW ONSHORE WELLS.—Natural gas determined in accordance with section 503 to be produced (other than from the Outer Continental Shelf) from—

(i) any new well which is 2.5 miles or more (determined in accordance with paragraph (2)) from the nearest marker well; or

(ii) any completion location, of any new well, which is located at a depth at least 1,000 feet below the deepest completion location of each marker well within 2.5 miles (determined in accordance with paragraph (2)) of such new well.

(C) NEW ONSHORE RESERVOIRS.—

(i) GENERAL RULE.—Except as provided in clauses (ii) and (iii), natural gas determined in accordance with section 503 to be produced (other than from the Outer Con-

tinental Shelf) from a reservoir from which natural gas was not produced in commercial quantities before April 20, 1977.

(ii) BEHIND-THE-PIPE EXCLUSION.—Clause (i) shall not apply to natural gas produced from any reservoir if—

(I) the reservoir was penetrated before April 20, 1977, by an old well from which natural gas or crude oil was produced in commercial quantities (whether or not such production was from such reservoir); and

(II) natural gas could have been produced in commercial quantities from such reservoir through such old well before April 20, 1977.

(iii) WITHELD GAS EXCLUSION.—Clause (i) shall not apply to natural gas produced from any reservoir—

(I) if such natural gas is produced through an old well; and

(II) subject to clause (iv), suitable facilities for the production and delivery to a pipeline of such natural gas were in existence on April 20, 1977.

(iv) EMERGENCY SALE FACILITIES.—The criteria of clause (iii) (II) shall not be considered to be met by reason of the existence of production and delivery facilities which were installed to carry out sales and deliveries of natural gas—

(I) under section 6 of the Emergency Natural Gas Act of 1977; or

(II) under the emergency sale authority pursuant to Opinion 699-B issued by the Federal Power Commission under section 7(c) of the Natural Gas Act.

(2) DETERMINATIONS OF DISTANCE.—For purposes of determining the distance from any new well to any marker well—

(A) SURFACE LOCATION TO SURFACE LOCATION.—The measurement shall be the horizontal distance from the surface location of the new well to the surface location of the marker well—

(i) in any case in which the new well meets requirements for the nondirectional drilling of wells prescribed by the appropriate State or Federal agency having regulatory jurisdiction over the drilling of such well; or

(ii) in any case in which—

(I) the surface drilling of such new well began on or after February 19, 1977;

(II) production of natural gas in commercial quantities began from such well before the date of the enactment of this Act; and

(III) the drilling of such well was not subject to any requirement regarding directional or nondirectional drilling, or the drilling of such well was subject to requirements regarding directional drilling but such requirements did not necessitate the obtaining of any permit or other certificate before drilling began.

(B) COMPLETION LOCATION TO SURFACE LOCATION.—In the case of any new well which is not covered by subparagraph (A), the measurements shall be the horizontal distance from—

(i) the closest point of any completion location of the new well, vertically projected to the same elevation as the surface location of the nearest marker well; to

(ii) the surface location of such marker well.

(3) DETERMINATION OF COMMERCIAL QUANTITIES.—For purposes of determining whether production of natural gas has occurred in commercial quantities under paragraph (1)(C)—

(A) a rebuttable presumption exists that production from a reservoir in commercial quantities has not occurred if natural gas has not been sold and delivered from such reservoir before April 20, 1977; and

(B) quantities of natural gas sold in interstate commerce (within the meaning of the Natural Gas Act) shall not be taken into account if such quantities were sold before the date of the enactment of this Act—

(i) under section 6 of the Emergency Natural Gas Act of 1977; or

(ii) under the emergency sale authority pursuant to Opinion 699-B issued by the Federal Power Commission under section 7 (c) of the Natural Gas Act.

(4) NEW WELLS WHICH ARE ALSO MARKER WELLS.—For purposes of applying paragraph (c)(1)(B)(ii) in the case of any marker well which is also a new well under section 2(3)(B), the reference in such

paragraph (c)(1)(B)(ii) to the deepest completion location of any marker well shall be deemed to be a reference to any subsurface location from which natural gas was produced in commercial quantities after January 1, 1970, and before February 19, 1977.

(d) OCS GAS QUALIFYING FOR NEW NATURAL GAS CEILING PRICE.—For the purposes of this section—

(1) OCS RESERVOIRS DISCOVERED ON OR AFTER JULY 27, 1976.—Natural gas determined in accordance with section 503 to be produced from an old lease on the Outer Continental Shelf shall qualify for the new natural gas ceiling price if such natural gas is produced from a reservoir which was not discovered before July 27, 1976.

(2) RESERVOIRS PENETRATED BEFORE JULY 27, 1976.—For purposes of paragraph (1), a reservoir shall be considered as having been discovered before July 27, 1976, if—

(A) such reservoir was penetrated by a well before July 27, 1976; and

(B) with respect to such well—

(i) the results of any production test meeting the requirements of OCS Order No. 4 demonstrate that, as of the time of such test, the reservoir is capable of producing in paying quantities (within the meaning of such Order);

(ii) any production capability evidence meeting the requirements of OCS Order No. 4 demonstrates that, as of the time such evidence is obtained, the reservoir is capable of producing in paying quantities (within the meaning of such Order); or

(iii) subject to paragraph (3), an induction-electric log, sidewall cores and core

analysis, or a wire line formation test indicates that, as of the time of such test, the reservoir is commercially producible.

(3) EFFECT OF NEGATIVE PRODUCTION CAPABILITY TESTS.—For purposes of paragraph (1), a reservoir shall not be considered as having been discovered before July 27, 1976, by the penetration of such reservoir by a well before July 27, 1976, if, with respect to such well—

(A) a production test meeting the requirements of OCS Order No. 4 was performed and the results of such test fail to demonstrate that, as of the time of such test, such reservoir was capable of producing in paying quantities (within the meaning of such Order); and

(B) production capability evidence meeting the requirements of OCS Order No. 4 does not exist or, if existing, does not demonstrate that, as of the date such evidence was obtained, such reservoir was capable of producing in paying quantities (within the meaning of such Order).

(4) BURDEN OF PROOF.—For purposes of paragraph (1), the producer shall have the burden of showing that—

(A) no test described in paragraph (2)(B)(i) or (iii) was performed and no evidence described in paragraph (2)(B)(ii) or (iii) exists; or

(B) if any such test was performed or such evidence exists, the results of such test or such evidence do not provide the applicable demonstration or indication specified under paragraph (2).

(5) DEFINITION OF OCS ORDER NO. 4.—For purposes of this subsection, the term "OCS Order No. 4"

means the order numbered 4 of the Conservation Division, Geological Survey, Department of the Interior, as approved by the Chief of the Conservation Division on August 28, 1969.

(e) EXCLUSION OF CERTAIN ALASKA NATURAL GAS.—The preceding provisions of this section shall not apply to any natural gas produced from the Prudhoe Bay Unit of Alaska and transported through the natural gas transportation system approved under the Alaska Natural Gas Transportation Act of 1976.

Section 103, 15 U.S.C. § 3313:

(a) APPLICATION.—In the case of natural gas determined in accordance with section 503 to be produced from any new, onshore production well, the maximum lawful price computed under subsection (b) shall apply to any first sale of such natural gas delivered during any month.

(b) MAXIMUM LAWFUL PRICE.—

(1) GENERAL RULE.—The maximum lawful price under this section for any month shall be—

(A) $1.75 per million Btu's, in the case of April 1977; and

(B) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this paragraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month.

(2) PRODUCTION AFTER 1984 FROM WELLS 5,000 FEET OR LESS IN DEPTH.—Effective beginning with the month of January 1985 and in any month thereafter, in the case of any first sale of natural gas which was not committed or dedicated to interstate commerce on April 20, 1977, and which is produced from a new, onshore production well from a comple-

tion location located at a depth of 5,000 feet or less, the maximum lawful price under this section for any such natural gas delivered during any month shall be a price which is midway between—

(A) the maximum lawful price, per million Btu's computed for such month under section 102 (relating to new natural gas); and

(B) the maximum lawful price, per million Btu's, computed for such month under paragraph (1).

(c) DEFINITION OF NEW, ONSHORE PRODUCTION WELL.—For purposes of this section, the term "new, onshore production well" means any new well (other than a well located on the Outer Continental Shelf)—

(1) the surface drilling of which began on or after February 19, 1977;

(2) which satisfies applicable Federal or State well-spacing requirements, if any; and

(3) which is not within a proration unit—

(A) which was in existence at the time the surface drilling of such well began;

(B) which was applicable to the reservoir from which such natural gas is produced; and

(C) which applied to a well (i) which produced natural gas in commercial quantities or (ii) the surface drilling of which was begun before February 19, 1977, and which was thereafter capable of producing natural gas in commercial quantities.

(d) EXCLUSION OF CERTAIN ALASKA NATURAL GAS.—The preceding provisions of this section shall not apply to any natural gas produced from the Prudhoe Bay Unit of Alaska and transported through the natural gas trans-

portation system approved under the Alaska Natural Gas Transportation Act of 1978.

Section 104, 15 U.S.C. § 3314:

(a) APPLICATION.—In the case of natural gas committed or dedicated to interstate commerce on the day before the date of the enactment of this Act and for which a just and reasonable rate under the Natural Gas Act was in effect on such date for the first sale of such natural gas, the maximum lawful price computed under subsection (b) shall apply to any first sale of such natural gas delivered during any month.

(b) MAXIMUM LAWFUL PRICE.—

(1) GENERAL RULE.—The maximum lawful price under this section for any month shall be the higher of—

(A) (i) the just and reasonable rate, per million Btu's established by the Commission which was (or would have been) applicable to the first sale of such natural gas on April 20, 1977, in the case of April 1977; and

(ii) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this subparagraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month, or

(B) any just and reasonable rate which was established by the Commission after April 27, 1977, and before the date of the enactment of this Act and which is applicable to such natural gas.

(2) CEILING PRICES MAY BE INCREASED IF JUST AND REASONABLE.—The Commission may, by rule or order, prescribe a maximum lawful ceiling price, ap-

plicable to any first sale of any natural gas (or category thereof, as determined by the Commission) otherwise subject to the preceding provisions of this section, if such price is—

(A) higher than the maximum lawful price which would otherwise be applicable under such provisions; and

(B) just and reasonable within the meaning of the Natural Gas Act.

Section 105, 15 U.S.C. § 3315:

(a) APPLICATION.—The maximum lawful price computed under subsection (b) shall apply to any first sale of natural gas delivered during any month in the case of natural gas, sold under any existing contract or any successor to an existing contract, which was not committed or dedicated to interstate commerce on the day before the date of the enactment of this Act.

(b) MAXIMUM LAWFUL PRICE.—

(1) GENERAL RULE.—Subject to paragraphs (2) and (3), the maximum lawful price under this section shall be the lower of—

(A) the price under the terms of the existing contract, to which such natural gas was subject on the date of the enactment of this Act, as such contract was in effect on such date; or

(B) the maximum lawful price, per million Btu's, computed for such month under section 102 (relating to new natural gas).

(2) CONTRACT PRICE EXCEEDING NEW GAS CEILING PRICE ON ENACTMENT.—In the case of any natural gas described in subsection (a) for which the contract price applicable on the date of the enactment of this Act exceeds the maximum lawful price, per mil-

lion Btu's, computed for such date under section 102 (relating to new natural gas), the maximum lawful price under this section shall be the higher of—

(A) the maximum lawful price, per million Btu's, computed for such month under section 102; or

(B) (i) the contact price on the date of the enactment of this Act, in the case of the month in which this Act is enacted; and

(ii) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this subparagraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month.

(3) PRICE INCREASES RESULTING FROM INDEFINITE PRICE ESCALATOR CLAUSES.—

(A) IN GENERAL.—Effective January 1985, and each month thereafter, in the case of any first sale of natural gas, which is sold at a price established under any indefinite price escalator clause of any existing contract or successor to an existing contract and for which the contract price on December 31, 1984, is higher than $1.00 per million Btu's, the maximum lawful price under this section for any such natural gas delivered during any month shall be the higher of—

(i) the maximum lawful price, per million Btu's, computed under paragraph (2) (B); or

(ii) (I) in the case of January 1985, the maximum lawful price, per million Btu's computed under section 102 (relating to new natural gas) for such month; and

(II) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this clause for the immediately preceding month multiplied by the monthly equivalent of the sum of a factor equal to the annual inflation adjustment factor applicable for such month plus .03.

(B) DEFINITION OF INDEFINITE PRICE ESCALATOR CLAUSE.—For purposes of this paragraph, the term "indefinite price escalator clause" includes any provision of any contract—

(i) which provides for the establishment or adjustment of the price for natural gas delivered under such contract by reference to other prices for natural gas, for crude oil, or for refined petroleum products; or

(ii) which allows for the establishment or adjustment of the price of natural gas delivered under such contract by negotiation between the parties.

(C) CONTRACT MODIFICATIONS AFTER MAY 3, 1978, TO BE DISREGARDED.—In the case of any natural gas which was subject to any contract on May 3, 1978, that contained an indefinite price escalator clause on such date, no amendment to or modification of the operation of such contract made after such date may have the effect of limiting or precluding the application of this paragraph on or after January 1, 1985, to prices allowed with respect to such natural gas.

(D) EXCLUSION.—Subparagraph (A) shall not apply to any first sale of new natural gas (as defined in section 102(c)), stripper well natural gas (as defined in section 108(b)), high-cost natural gas (as defined in section 107(c)), natural gas produced from a new, onshore pro-

duction well (as defined in section 103(c)) from a completion location located at a depth of more than 5,000 feet, and, beginning July 1, 1987, or, if later, the date of expiration of any price controls reimposed under section 122, natural gas produced from any new, onshore production well (as defined in section 103(c)) from a completion location located at a depth of 5,000 feet or less.

(c) DEFINITION OF CONTRACT PRICE.—For purposes of this section, the term "contract price", when used with respect to any specific date, means—

(1) the price paid, per million Btu's, under a contract for deliveries of natural gas occurring on such date; or

(2) if no deliveries of natural gas occurred under such contract on such date, the price, per million Btu's, that would have been paid had such deliveries occurred on such date.

Section 106, 15 U.S.C. § 3316:

(a) INTERSTATE ROLLOVER CONTRACTS.—In the case of any first sale under any rollover contract of natural gas which was committed or dedicated to interstate commerce on the day before the date of the enactment of this Act, the maximum lawful price under this subsection for such natural gas delivered during any month shall be the higher of—

(1)(A) in the case of the month in which the effective date of such rollover contract occurs, the just and reasonable rate, if any, per million Btu's, established by the Commission and applicable on such date to the natural gas subject to the expired contract; and

(B) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed un-

der this paragraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month; or

(2) (A) $0.54 per million Btu's, in the case of April 1977; and

(B) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this paragraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month. For purposes of this subsection, the term "rollover contract" includes any contract which would have been a rollover contract but for the fact that the expiration of the previous contract occurred prior to the day before the date of the enactment of this Act.

(b) INTERSTATE ROLLOVER CONTRACTS.—

(1) GENERAL RULE.—In the case of any first sale under any rollover contract of natural gas which was not committed or dedicated to interstate commerce on the day before the date of the enactment of this Act, the maximum lawful price under this subsection for such natural gas delivered during any month shall be the higher of—

(A) (i) the maximum price paid under the expired contract, per million Btu's, in the case of the month in which the effective date of such rollover contract occurs; and

(ii) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this subparagraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month; or

(B) (i) $1.00 per million Btu's, in the case of April 1977; and

(ii) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this subparagraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month.

(2) CERTAIN STATE OR INDIAN PRODUCTION OR ROYALTY SHARES.—

(A) GENERAL RULE.—In the case of any first sale under any rollover contract of natural gas which was not committed or dedicated to interstate commerce on the day before the date of the enactment of this Act and which constitutes a State government's or Indian tribe's natural gas production, or royalty share or other interest (as of such day) in natural gas production, from real property (including subsurface mineral interests) owned on the date of the enactment of this Act by such State government or Indian tribe (as the case may be, the maximum lawful price under this subsection for any such natural gas delivered during any month shall be the maximum lawful price, per million Btu's, computed for such month under section 102 (relating to new natural gas).

(B) INDIAN TRIBAL LANDS.—For purposes of this paragraph, land shall be considered to be owned by an Indian tribe only if—

(i) such land is owned directly by such tribe; or

(ii) such land is held by the United States or any State in trust for Indian persons and is located within the boundaries of an Indian reservation (as such boundaries were in effect on the date of the enactment of this Act).

(C) DEFINITIONS.—For purposes of this paragraph—

(i) STATE GOVERNMENT.—The term "State government" means any State or any agency, instrumentality, or political subdivision of a State.

(ii) INDIAN TRIBE.—The term "Indian tribe" means any Indian tribe recognized as eligible for services provided by the Secretary of the Interior to Indians.

(c) CEILING PRICES MAY BE INCREASED IF JUST AND REASONABLE.—The Commission may, by rule or order, prescribe a maximum lawful price, applicable to any first sale of any natural gas (or category thereof, as determined by the Commission) otherwise subject to the preceding provisions of this section, if such price is—

(1) higher than the maximum lawful price which would otherwise be applicable under such provisions; and

(2) just and reasonable within the meaning of the Natural Gas Act.

Section 107, 15 U.S.C. § 3317:

(a) WELLS COMPLETED BELOW 15,000 FEET.—In the case of any first sale of high-cost natural gas produced from any well the surface drilling of which began on or after February 19, 1977, if such production is from any completion location which is located at a depth of more than 15,000 feet, the maximum lawful price under this section for such natural gas delivered during any month shall be the maximum lawful price, per million Btu's, computed for such month under section 102 (relating to new natural gas).

(b) COMMISSION AUTHORITY TO PRESCRIBE HIGHER INCENTIVE PRICES.—The Commission may, by rule or order,

prescribe a maximum lawful price, applicable to any first sale of any high-cost natural gas, which exceeds the otherwise applicable maximum lawful price to the extent that such special price is necessary to provide reasonable incentives for the production of such high-cost natural gas.

(c) DEFINITION OF HIGH-COST NATURAL GAS.—For purposes of this section, the term "high-cost natural gas" means natural gas determined in accordance with section 503 to be—

(1) produced from any well the surface drilling of which began on or after February 19, 1977, if such production is from a completion location which is located at a depth of more than 15,000 feet;

(2) produced from geopressured brine;

(3) occluded natural gas produced from coal seams;

(4) produced from Devonian shale; and

(5) produced under such other conditions as the Commission determines to present extraordinary risks or costs.

(d) PROVISIONS FOR HIGH-COST NATURAL GAS TO BE ELECTIVE.—If any credit, exemption, deduction, or comparable adjustment applicable to the computation of any Federal tax is specifically allowable with respect to any high-cost natural gas (or category thereof) under any provision of law enacted after the date of the enactment of this Act, the provisions of subsections (a) and (b) of this section and the provisions of subtitle B shall not apply to such natural gas produced from any well unless an election to have such provisions apply (in lieu of such credit, exemption, deduction, or adjustment) with respect to such natural gas produced from such well is filed with the Commission on or before the later of—

(A) the 30th day after the date of the enactment of the Act under which such credit, exemption, deduction, or adjustment is provided; or

(B) the date the surface drilling of such well began.

Section 108, 15 U.S.C. § 3318:

(a) GENERAL RULE.—In the case of any first sale of stripper well natural gas the maximum lawful price under this section for such natural gas delivered during any month shall be—

(1) $2.09 per million Btu's, in the case of May 1978; and

(2) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this subsection for the preceding month multiplied by the monthly equivalent of a factor equal to the sum of—

(A) the annual inflation adjustment factor applicable for such month; plus

(B) (i) .035, in the case of any month beginning before April 20, 1981; or

(ii) .04, in the case of any month beginning after April 20, 1981.

(b) DEFINITION OF STRIPPER WELL NATURAL GAS.—

(1) GENERAL RULE.—Except as provided in paragraph (2), the term "stripper well natural gas" means natural gas determined in accordance with section 503 to be nonassociated natural gas produced during any month from a well if—

(A) during the preceding 90-day production period, such well produced nonassociated natural gas at a rate which did not exceed an average

of 60 Mcf per production day during such period; and

(B) during such period such well produced at its maximum efficient rate of flow, determined in accordance with recognized conservation practices designed to maximize the ultimate recovery of natural gas.

(2) PRODUCTION IN EXCESS OF 60 MCF.—The Commission shall, by rule, provide that, if nonassociated natural gas produced from a well which previously qualified as a stripper well under paragraph (1) exceeds an average of 60 Mcf per production day during any 90-day production period, such natural gas may continue to qualify as stripper well natural gas if the increase in nonassociated natural gas produced from such well was the result of the application of recognized enhanced recovery techniqes.

(3) DEFINITIONS.—For purposes of this subsection—

(A) PRODUCTION DAY.—The term "production day" means—

(i) any day during which natural gas is produced; and

(ii) any day during which natural gas is not produced if production during such day is prohibited by a requirement of State law or a conservation practice recognized or approved by the State agency having regulatory jurisdiction over the production of natural gas.

(B) 90-DAY PRODUCTION PERIOD.—The term "90-day production period" means any period of 90 consecutive calendar days excluding any day during which natural gas is not produced for reasons other than voluntary action of any per-

son with the right to control production of natural gas from such well.

(C) NONASSOCIATED NATURAL GAS.—The term "nonassociated natural gas" means natural gas which is not produced in association with crude oil.

Section 109, 15 U.S.C. § 3319:

(a) APPLICATION.—The maximum lawful price computed under subsection (b) shall apply to any first sale of any natural gas delivered during any month, in the case of any natural gas which is not covered by any maximum lawful price under any other section of this subtitle, including—

(1) natural gas produced from any new well not otherwise qualifying for a higher maximum lawful price under this title;

(2) natural gas committed or dedicated to interstate commerce on the day before the date of the enactment of this Act and for which a just and reasonable rate under the Natural Gas Act was not in effect on such date for the first sale of such natural gas;

(3) natural gas which was not committed or dedicated to interstate commerce on the day before the date of the enactment of this Act and which was not subject to an existing contract on such day; and

(4) natural gas produced from the Prudhoe Bay Unit of Alaska and transported through the natural gas transportation system approved under the Alaska Natural Gas Transportation Act of 1976.

(b) MAXIMUM LAWFUL PRICE.—

(1) The maximum lawful price under this section for any month shall be—

(A) $1.45 per million Btu's, in the case of April 1977; and

(B) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this paragraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month.

(2) CEILING PRICES MAY BE INCREASED IF JUST AND REASONABLE.—The Commission may, by rule or order, prescribe a maximum lawful ceiling price, applicable to any first sale of any natural gas (or category thereof, as determined by the Commission) otherwise subject to the preceding provisions of this section, if such price is—

(A) higher than the maximum lawful price which would otherwise be applicable under such provisions; and

(B) just and reasonable within the meaning of the Natural Gas Act.

Sections 501(a), (b), 15 U.S.C. §§ 3411(a), (b):

(a) IN GENERAL.—Except where expressly provided otherwise, the Commission shall administer this chapter. The Commission, or any other Federal officer or agency in which any function under this Act is vested or delegated, is authorized to perform any and all acts (including any appropriate enforcement activity), and to prescribe, issue, amend, and rescind such rules and orders as it may find necessary or appropriate to carry out its functions under this chapter.

(b) AUTHORITY TO DEFINE TERMS.—Except where otherwise expressly provided, the Commission is authorized to define, by rule, accounting, technical, and trade terms used in this Act. Any such defini-

tion shall be consistent with the definitions set forth in this chapter.

Section 506(a), 15 U.S.C. § 3416(a):

(a) ORDERS.—

(1) IN GENERAL.—The provisions of this subsection shall apply to judicial review of any order, within the meaning of section 551(6) of title 5, United States Code (other than an order assessing a civil penalty under section 504(b)(4) or any order under section 302 or any order under section 303), issued under this chapter and to any final agency action under this chapter required to be made on the record after an opportunity for an agency hearing.

(2) REHEARING.—Any person aggrieved by any order issued by the Commission in a proceeding under this chapter to which such person is a party may apply for a rehearing within 30 days after the issuance of such order. Any application for rehearing shall set forth the specific ground upon which such application is based. Upon the filing of such application, the Commission may grant or deny the requested rehearing or modify the original order without further hearing. Unless the Commission acts upon such application for rehearing within 30 days after it is filed, such application shall be deemed to have been denied. No person may bring an action under this section to obtain judicial review of any order of the Commission unless—

(A) such person shall have made application to the Commission for a hearing under this subsection; and

(B) the Commission shall have finally acted with respect to such application.

For purposes of this section, if the Commission fails to act within 30 days after the filing of such applica-

tion, such failure to act shall be deemed final agency action with respect to such application.

(3) AUTHORITY TO MODIFY ORDERS.—At any time before the filing of the record of a proceeding in a United States Court of Appeals, pursuant to paragraph (4), the Commission may, after providing notice it determines reasonable and proper, modify or set aside, in whole or in part, any order issued under the provisions of this chapter.

(4) JUDICIAL REVIEW.—Any person who is a party to a proceeding under this chapter aggrieved by any final order issued by the Commission in such proceeding may obtain review of such order in the United States Court of Appeals for any circuit in which the party to which such order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia circuit. Review shall be obtained by filing a written petition, requesting that such order be modified or set aside in whole or in part, in such Court of Appeals within 60 days after the final action of the Commission on the application for rehearing required under paragraph (2). A copy of such petition shall forthwith be transmitted by the clerk of such court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to such order of the Commission shall be considered by the court if such objection was not urged before the Commission in the application for rehearing unless there was reasonable ground for the failure to do so. The finding of the Commission

as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as the court deems proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive. The Commission shall also file with the court its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

(5) ORDERS REMAIN EFFECTIVE.—The filing of an application for rehearing under paragraph (2) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under paragraph (4) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

NATURAL GAS ACT,

15 U.S.C. § 717, *et seq.*

Section 16, 15 U.S.C. § 717o:

> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

Sections 19(a), (b), 15 U.S.C. § 717r(a), (b)

> (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically

the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Any party to a proceeding under this Chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be

exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of Title 28.

FEDERAL POWER ACT

16 U.S.C. § 791a, *et seq.*

Section 309, 16 U.S.C. § 825h

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

APPENDIX F

REGULATIONS

18 C.F.R. § 270.204 (1983)

§ 270.204. Btu content per cubic foot of natural gas.

(a) *Measurement.* The Btu content of one cubic foot of natural gas under the standard conditions specified in paragraph (b) of this section is the number of Btu's produced by the complete combustion of such cubic foot of gas, at constant pressure with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of the gas and air and when the water formed by such combustion is condensed to a liquid state.

(b) *Standard conditions.* The standard conditions for purposes of paragraph (a) of this section are as follows: The gas is saturated with water vapor at 60 degrees Fahrenheit under a pressure equivalent to that of 30.00 inches of mercury at 32 degrees Fahrenheit, under standard gravitational force (980.665 centimeters per second squared).

(c) *Application of the maximum lawful price.* The maximum lawful price prescribed by the NGPA and this part for any first sale of natural gas applies to the Btu's actually delivered in that first sale.

APPENDIX G

NATURAL GAS CONTRACT MEASUREMENT AND QUALITY CLAUSES

GAS MEASUREMENT COMMITTEE REPORT

NO. 4A

FIRST EDITION

AUGUST 1971

AGA

AMERICAN GAS ASSOCIATION

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GAS MEASUREMENT COMMITTEE
(REPORT NO. 4A)

REPORT ON
NATURAL GAS CONTRACT
MEASUREMENT AND QUALITY CLAUSES

FIRST PRINTING
AUGUST, 1971

SECOND PRINTING
JUNE, 1977

Prepared By:
THE TASK GROUP
ON
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A.G.A. MEASUREMENT COMMITTEE

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A.G.A. MEASUREMENT COMMITTEE REPORT ON GAS CONTRACTS

INTRODUCTION

Along with the Measurement Committee's continuous study of developments concerning methods and procedures applicable to the measurement of natural gas, the resultant effects on the requirements of the gas contract are closely watched. This is the initiation of our published reporting on gas contracts and, as with the other technical reports of this committee, the plan is to revise this report as found necessary to keep the industry adequately informed on the subject.

This report is offered for information purposes only and is not represented as a standard. The information herein is given with the thought that the attainment of the greatest possible accuracy and agreement between contracting parties might be achieved through uniform practices. It is hoped that the report may (1) encourage universal endeavor for practical accuracy of gas measurement within established commercial tolerances, rather than for impractical theoretical solutions or advantageous positions; (2) encourage adoption of the American National Standard base conditions for gas measurement units; (3) encourage willingness to follow the industry in its adoption of changes for the purpose of improving accuracy and providing more uniform results; (4) encourage uniformity in contract measurement and gas quality clause wording; (5) encourage reliance upon the ability of the measurement people of the respective gas companies to obtain the highest possible accuracy through the use of applicable A.G.A. Measurement Committee publications; (6) encourage the attainment of brevity in the gas contract measurement clause through the use of references to A.G.A. Measurement Committee publications.

The A.G.A. Gas Measurement Committee maintains continuous liaison with others involved in researching gas measurement techniques throughout the world. It also sponsors within the structure of A.G.A. such gas measurement research undertakings as appear to be necessary for the purpose of clearing up any questions concerning the scope, accuracy and applicability of practices. Data from all available sources are considered in the development of recommendations.

The A.G.A. Measurement Committee Reports, covering the various phases of gas measurement, are provided as a source of information and an avenue of convenience to those writing gas contracts. Also they offer technical guidance to those charged with the responsibility for measuring gas under terms of such contracts. Contracts may be condensed, simplified and repetitious wordage can be avoided to the extent it is possible to employ standard units of measurement.

Assuming the aim of the gas measurement clause of any gas contract is to provide the greatest practical accuracy, this end is best served by the technical competence of the gas measurement specialists employed by the contracting parties. Gas contracts should be written in a manner which will permit such measurement specialists to best employ the type meter or meters, auxiliary devices and test equipment available.

The interdependence of the various segments of the natural gas industry gains added recognition with better communication. In recent years the fuel gas industry has made remarkable progress toward attaining general agreement in gas measurement practices through the use of published recommendations of the A.G.A. Measurement Committee. These publications include the "Gas Measurement Manual," "Gas Measurement Committee Report #3 on Orifice Meters," "Manual for the Determination of Supercompressibility Factors for Natural Gas," "Report on Recording Charts," "Energy Measure-

ment Report," "Displacement Meter Report," and other Reports related to gas measurement and gas quality. These Reports contain observations related to the measurement of gas and gas quality via instrumentation types and techniques in common use. In the contract measurement clause, A.G.A. Measurement Committee Reports may be referred to individually by title and date of issue and thus be made a part of the contract.

It is the intent of the A.G.A. Measurement Committee that its several Reports collectively provide full information on all normally used methods of measuring high pressure natural gas, as well as on natural gas quality measurements and specifications. The subjects covered include: Orifice Meters, Energy Measurement; Displacement Meters; Other Methods of Measurement, Units of Measurement; Recording Charts; Gas Accounting; Gas Quality Measurements; Measuring and Regulating Station Design; Natural Gas Contract-Measurement and Quality Clauses; Glossary of Gas Measurement and Gas Quality Terms.

The A.G.A. Measurement Committee does not recommend the type or make of meters or instruments to be employed in any instance. It merely provides suggestions to assist the operators to obtain commercial accuracy from the use of the metering systems of their own choice.

The A.G.A. Measurement Committee Report #3 is specifically provided as a reference covering orifice meter measurement. On the other hand, the manual concerning the determination of Supercompressibility Factors for natural gas, which by reference is made a part of Report #3, is actually applicable in the instance of both orifice meter and displacement meter measurements. The technicians will recognize the displacement meter supercompressibility multiplier as the square of the orifice meter supercompressibility factor. Generally speaking, the technicians responsible for the measurement and computation of gas volumes have available for their use

the latest issues of these and other publications of the A.G.A. Measurement Committee. In many companies those responsible for writing the gas contracts are also provided with these publications which are obtainable from A.G.A. Headquarters at a nominal cost.

It is recommended that the Gas Measurement and Gas Quality Clauses of Contracts be checked and approved by the responsible Gas Measurement people of each contracting party and the company legal departments before such contracts are officially signed. This is for the purpose of providing greater assurance that the statements, requirements, and references concerning measurement and gas quality are accurate, adequate, unencumbered with needless instructions and completely practical. The measurement man's familiarity with the gas quality and physical properties will help to assure that inherent characteristics are appropriately considered and, where applicable, are disposed of in the original pricing of the gas.

GAS MEASUREMENT UNITS

The Three Measurement Concepts

It is necessary for parties negotiating gas custody transfer contracts to first determine whether the gas is to be accounted for in units of Volume, Energy or Weight. At this time it appears that most large volume natural gas custody transfer measurement takes place on a Volumetric basis. However, measurement in Energy and Weight units has more recently been shown to be equally feasible. The Energy and Weight concepts combine the quantitative and qualitative parameters of gas measurement into a single unit of measure. As natural gas becomes more precious, the parties to gas sales contracts are more generally developing an awareness of the effect of thermal energy content on the intrinsic value of gas per unit volume. This understandably may lead to a wider use of energy and or weight units in large volume high pressure gas measurement.

Volumetric Measurement

The basic unit of gas in Volumetric measurement in a cubic foot of the gas under specific conditions of Pressure and Temperature.

In commercial measurement of natural gas by volume, the gas is generally accounted for in units of 1,000 cubic feet, which for brevity is called an Mcf. The common multiples of Mcf used in natural gas volume statics will be recognized as follows:

1 Mcf	1 thousand cu. ft.	
1,000 Mcf	1 million cu. ft.	1 MMcf
1,000,000 Mcf	1 billion cu. ft.	1 Bcf

The actual flowing volume of any gas at the pressure and temperature existing in the meter must be converted into equivalent volume at standard base pressure and temperature. Adhering to the English system of measure, gas pressure is expressed in pounds per square inch and gas temperature is expressed in degrees Fahrenheit (°F).

Contract base pressure is stated in pounds per square inch absolute, for which the abbreviation is "psia." The contract base temperature is generally expressed in °F because this term is readily recognizable by the layman, while (°F+460), the equivalent absolute temperature value known as degrees Rankine, is applied in the equations used in the computation of gas volumes.

American National Standard Z132.1—1969 reads as follows: "The base conditions of pressure and temperature for use in the volumetric measurement of natural gas shall be 14.73 psia and 60°F." (*Note*: For the information of those who might wonder how these base pressure and temperature values came into being, 14.73 was first used because it is the mean sea level atmospheric pressure in the U.S.A. (continental lower 48) expressed

in pounds per square inch rounded off to two decimal places, while 60°F was found to approximate the mean ambient temperature.)

The Federal Government has adopted the above National Standard pressure and temperature base in all of its dealings concerning natural gas. There is a serious need for those states which have not done likewise to do so even at the inconvenience of adjusting gas tax rates to nullify monetary effect. There is also a need for those gas companies which have not adopted this standard base to do so for the sake of equitable commodity exchange, and uniform statistics relative to production and reserves.

Energy Measurement

The Energy Unit is the British thermal unit (Btu), the heat required to raise the temperature of one pound of water one °F at mean sea level USA. Due to the small value of the Btu in thermal energy, the "therm" (100,000 Btu) and the "dekatherm" (1,000,000 Btu) are used for commodity transfer in energy units.

The actual number of Btu in a cubic foot of the gas at the specified contract base pressure and temperature conditions depends on the gas composition, where its thermal energy dimensions are found by calorimetry, fractional analysis or by empirical correlation involving the gas specific gravity and the contained inert compounds.

The trend appears to be toward the expression of Btu on an assumed dry gas basis as opposed to the antiquated water saturated basis since currently the actual condition of fuel gas transported to market in high pressure pipelines is essentially dry.

Gas energy measurement by conventional practice is achieved by two unrelated measurements; namely, gas volume metering to ascertain cubic feet of gas at given conditions and the determination of heat per unit of volume.

Approaches are open to the use of conventional mass and volume meters for direct energy readout, without secondary measurements in the field of calorimetry. Energy equations have been designed to take advantage of the physical properties of fuel gas, leading to orderly expression of its energy. Such equations account for non-combustible compounds present in solution as well as the combustible non-hydrocarbons which may be encountered with manufactured gas. The energy equations and other helpful information concerning energy measurement are provided in the A.G.A. Measurement Committee Energy Measurement Report.

In large volume gas measurement the "dekatherm" is the recommended energy billing unit, it being 1,000,000 Btu or one Mcf of 1,000 Btu/cf gas. Units of energy may also be expressed as megajoules, an international unit, or may be equated in kilowatt hours to facilitate comparison with electric energy. In contrast to measurement in cubical volume units, energy units combine the quantitative and qualitative parameters of gas measurements into a single unit of measure.

Weight Measurement

The Weight Unit of gas mass measurement is the pound avoirdupois. Measurement in terms of weight may be accomplished directly with true mass meters or indirectly by the use of the orifice meter or other inferential devices.

Weight meters and mass meters measure the weight or mass of a gas, respectively, without relationship to its cubical volume under any stated conditions of pressure and temperature. Thus, mass and weight meters function independent of pressure, temperature, specific gravity, and Boyle's law deviation. (This is not to suggest, however, that mass flow cannot be inferred from information obtainable through the use of volume meters.)

Although most mass measurements are expressed in pounds avoirdupois or pounds mass, obviously there are not limitations to the use of metric units—kilograms, for instance.

Weight and mass metering, like volume metering, is a quantitative measurement. However, in the instance of natural gases, freed of inert compounds, Btu per pound of gas is, within practical tolerances, a fixed ratio while Btu per unit volume tends to vary more widely.

It should be appreciated that a very slight difference may be found between the pound mass and the pound avoirdupois. Where weight units (pound avoirdupois) vary slightly with gravitational forces, mass units (pound mass) are not noticeably affected by earth's gravity.

QUALITY OF GAS—DISCUSSION

The typical natural gas transmission company transporting fuel gas for resale gathers its supply wherever it may be found over a wide geographical area from field producers, processing plants and other pipelines. The weighted average composition of the gas supply determines the quality of the composite stream of the natural gas transmission system. With field processing through efficient dehydrators and liquid separators, a major portion of the natural gas discovered will satisfy the practical criteria for fuel gas quality. In regard to those constituents which must be limited as to either maximum or minimum amounts, such limitations must all be specified in the transmission company's gas purchase contracts. The control of fuel gas quality must be vested in the field gas purchase function since it can not be economically performed after the purchased gas is comingled in the transmission stream. Consequently, the quality clause of the natural gas transmission company's gas sales tariff can in turn, with effectiveness, only set up allowable operating tolerances relative to the composition of the established transmission stream.

Commercial quality fuel gas or so-called fuel quality natural gas is that which meets the quality specifications of the applicable gas purchase contract or sales tariff. Although commercial fuel quality natural gas transported by pipelines to the wholesale market is normally a relatively pure commodity, the presence of more or less predictable quantities of condensible liquids, diluents and impurities must be anticipated and should be taken into account in establishing allowable tolerances relative to gas quality.

The physical-chemical properties, impurities and conditions on which allowable maximum or minimum values may be necessary are as follows: (1) Water vapor content, which the newest contracts tend to express in pounds per Mcf of gas; (2) Carbon dioxide content (CO_2) expressed as volume percent; (3) Nitrogen content (N_2) expressed as volume percent; (4) Condensible hydrocarbons, so-called natural gasoline fraction, expressed in (GPM) gallons per Mcf of gas; (5) Hydrogen sulfide (H_2S), which the newest contracts tend to express in grains per Mcf of gas; (6) Total sulfur, which the newest contracts tend to express in grains per Mcf of gas; (7) Oxygen (O_2) expressed as a volume percent; (8) Other liquids, solids, gums and gum forming constituents; (9) Maximum gas temperature expressed in ° F and; (10) Heating value expressed in Btu per cubic foot of gas.

First of all, fuel gas contract quality specifications must be practical. In estimating fuel gas contract quality specifications it is advisable to consider how restrictive one can be without adverse effect on procurement of the needed gas supply, development of gas reserves, and the competitive price of natural gas in the fuel markets.

Typical natural gas purchased for resale as fuel gas by the transmission companies is primarily methane. The methane molecule has only one carbon atom; thus, the numerical carbon tag for methane is C_1. (The numerical carbon tag of the respective hydrocarbons is in direct

relation to their relative molecular weights.) Methane remains in gaseous form under all pressure and temperature conditions experienced in natural gas transmission and distribution pipelines, but it can be reduced to a liquid in a cryogenic environment to produce LNG.

Next to methane in molecular weight is the ethane hydrocarbon compound whose molecule has two carbon atoms, and its numerical carbon tag is C_2.

Typical natural gas also contains varying concentrations of hydrocarbon compounds heavier than methane and ethane. These include the so-called liquefiable hydrocarbons propane (C_3) and butane (C_4), and the yet heavier so-called condensible hydrocarbons consisting of the pentanes (C_5) and heavier hydrocarbons.

When natural gas is produced, the natural gasoline component (C_5 and heavier hydrocarbons) is often present to some extent disbursed in either a vapor or aerosol state with the base gas methane and other gaseous compounds.

Since hydrocarbon liquids are valuable as heating fuel, motor fuel, petrochem feed stock, etc., the producers of large natural gas volumes often find it profitable to install processing plants for extracting recoverable liquids before selling the gas to the pipeline companies. The residue (processed) gas from such plants normally has no more than a negligible liquefiable hydrocarbon content remaining, and its transportation will not result in the deposit of appreciable amounts of liquids in the transmission lines and distribution systems.

However, it must be remembered that an appreciable portion of the gas made available to natural gas transmission companies ordinarily comes from small reservoirs where the quantity of producible gas may be too small for profitable processing for the removal of the heavier hydrocarbons. With these relatively small quantities of gas, the only processing economically feasible may be that

which takes place when the gas flows through the field separators and dehydrators. However, properly designed field separation equipment of sufficient capacity and adequately maintained have proven effective in removing all free liquids from the flowing natural gas stream. Under these conditions, the gas and vapor stream delivered to the pipeline generally has a low water content; and as for hydrocarbons is, for all practical purposes, stabilized at the contract pressure, temperature and velocity conditions which exist in the field separators from time to time. Since it appears that average operating conditions in the major natural gas production area have been such as to provide approximately 0.2 GPM, this value has by common usage become a criterion in limiting the natural gasoline content by means of the natural gas purchase contract.

Since such field separator gas constitutes an essential portion of the nation's currently available fuel gas supply, it must be gathered and transported to the ultimate consumers. However, any attempt to transport and distribute field separator gas over long distances by itself can result in the accumulation of appreciable hydrocarbon liquids in the carrier lines as flowing conditions change. To avoid excessive liquid condensation in transmission and distribution lines, particularly during the cold season, the natural gasoline content of the gas stream should be as low as possible. Fortunately the natural gas transmission companies have tendered to them more of the lean processed gas than of the rich field separator gas. The commingling of the rich gas with the lean gas usually results in a composite transmission line gas stream having a condensible content of less than 0.1 GPM. With a composite stream GPM in this range, the accumulation of liquids in the main gas transmission lines and distribution system normally does not exceed an amount which can be routinely removed and disposed of by the respective operators. Studies indicate that in most cases further processing of the large volume com-

paratively lean composite gas streams of the transmission companies in an attempt to avoid the possibility of any liquid condensation in the gas transmission and distribution lines cannot be economically justified. Currently it appears that such processing could only increase the cost of the gas to the ultimate consumer. Therefore, for obvious reasons the supplier, transmission company and distribution company must each respectively recognize its own responsibility for equipping its systems with the necessary facilitates [sic] for the trapping and disposing of any hydrocarbon condensation which might occur at the pressure, temperature, and flow conditions likely to occur while the gas is in its custody.

In regard to water vapor content, it has been noted that in most cases the fuel quality natural gas transported to the wholesale markets by gas transmission companies carries an average water vapor content in the range of .002 to .004 pounds per Mcf. This low water vapor content is due to the generally high efficiency of the dehydration equipment of the gas suppliers in the production area. With the flowing conditions experienced in the major natural gas transmission systems in the continental U.S.A. (lower 48), they appear to be susceptible to hydrate formation at various water contents above .007 pounds/Mcf. Thus, the water vapor content of the gas supply gathered by the transmission companies is generally limited by contract to a maximum of .007 pounds per Mcf or less.

Carbon dioxide (CO_2) and nitrogen (N_2) are two components, often present to some extent in natural gas, that do not burn; thus, they are diluents which have the effect of lowering the heating value of the gas. In addition, CO_2 is corrosive to steel if water is also present; therefore, the gas purchase contracts of natural gas transmission companies usually limit the allowable CO_2 content to the lowest practical value under controlling circumstances.

The record indicates that oxygen exceeding an insignificant concentration is not often present in natural gas produced under positive pressure; however, to guard against unforeseen developments, the gas purchase contracts of natural gas transmission companies usually include a limitation as to allowable oxygen content, e.g. 0.2% by volume.

It appears that the sulfur compounds in fuel quality natural gas consist primarily of hydrogen sulfide (H_2S) and mercaptans (RSH) although trace quantities of other sulfur compounds are sometimes detectable. Hydrogen sulfide (H_2S) is very corrosive as well as toxic, but fortunately in most cases its presence in the natural gas which we have in mind is of insignificant proportions. To assure continuous surveillance of the H_2S content, it is customary for the maximum allowable H_2S content to be specified in gas purchase and sales contracts. The maximum allowable content is usually set at a practical value which provides a reasonable operating tolerance, e.g. 10.0 grains per 1000 cu. ft. of gas. In comparison with the H_2S content, the mercaptans and miscellaneous sulfur compounds normally are present in much smaller concentrations. Nevertheless, to guard against unforeseen increases in sulfur compounds as a whole, the gas purchase contracts and sales tariffs customarily set a practical limit as to the allowable total sulfur content, e.g., 100 grains per 1,000 cu. ft. of gas.

CHECKLIST FOR CONTRACT MEASUREMENT CLAUSE

NOTE: Selective use of the optional wordage offered in the following clauses is necessary in order that the peculiarities of each individual contract might be served. Blanks have been left for filling in values agreed upon where they differ from those offered. No contract should be prepared without consulting an attorney.

Measuring Stations:

1. Seller/Buyer shall install, maintain and operate, at Seller's/Buyer's own expense, at a location mutually agreeable, at or near the point of delivery, the Official Billing Measurement Station which shall consist of a measuring facility and all necessary auxiliary devices as approved by the representatives of parties hereto.

If orifice meters are used they shall utilize ———— "Taps" and shall be designed, installed, maintained and operated, and have volumes computed as may be mutually agreed upon by the parties in writing. The installation, operation and maintenance of the auxiliary devices used in the measurement of the gas shall be as may be mutually agreed upon by the operating representatives of the parties.

Seller/Buyer shall have access to all such official billing measurement equipment at reasonable hours, but the calibrating and adjusting thereof and the changing of charts shall be done by Seller/Buyer.

2. Seller/Buyer may install, maintain and operate, at its own expense and on its own property, such pressure-volume control regulators, check measuring equipment, instruments, and telemetering devices as it shall desire. Seller/Buyer hereby grants to Seller/Buyer the right to install, maintain and operate check measuring instruments and telemeters in and connected to Seller's/Buyer's official billing measuring station, provided that such instruments and connections shall be so installed as not to interfere with the operation or future revision of Seller's/Buyer's official billing meters and/or appurtenances, and Seller/Buyer shall indemnify and hold Seller/Buyer harmless from liability arising out of the installation, operation, maintenance, and removal of such appendages to the official billing measuring station. Seller/Buyer shall have access to any such check measuring and/or telemetering instruments at reasonable hours, but the read-

ing, calibrating and adjusting thereof and the changing of charts shall be done by Seller/Buyer.

3. Each party shall have the right to be present at the time of any installing, reading, cleaning, changing, repairing, inspecting, testing, calibrating, or adjusting done in connection with the other's measuring equipment installed hereunder. The records from such measuring equipment shall remain the property of their owner, but upon request each party will submit to the other its records and charts, together with calculations therefrom, for inspection and verification, subject to return within —— days after receipt thereof.

4. In the event a billing meter is out of service, or is determined to be registering inaccurately, the volumes of gas delivered hereunder during such period or periods shall be estimated by:

a) using the registration of any approved check meter or meters existing and agreed upon as being accurately registering, or;

b) correcting the error if the quantity or percentage of error is ascertainable by calibration, test, or mathematical calculation or, in the absence of both a), and b), then;

c) relating the quantity of delivery to deliveries during periods under similar conditions when the billing meter was deemed to have been registering accurately.

5. The accuracy of each party's measuring equipment shall be verified by such party at reasonable intervals, and, if requested, in the presence of representatives of the other party, but such verification shall not be required as a matter of routing more frequently than once in any thirty (30) day period. In the event either party shall notify the other that it desires a special test of any measuring equipment, the parties shall cooperate to secure a

prompt verification of the accuracy of such equipment. The expense of such special test as may be requested by either party shall be borne by the party requesting such test if the measuring equipment, by such test, is found to be correct.

6. If, upon test, any billing meter or any related instrument or device the readings of which are used in the registration, integration, or computation of quantities which affect the billing hereunder is found to be in error to the extent that it introduces not more than a 2% measurement error in the individual billing meter or meters affected, previous records of such equipment shall be considered accurate in computing deliveries hereunder; but such equipment shall be adjusted at once to function correctly. If, upon test, any such measuring equipment shall be found to be inaccurate to the extent that it causes the end result measurement of the individual billing meter or meters so affected to be in error by an amount exceeding two percent (2%), at a recording corresponding to the average hourly rate of flow through the individual billing meter or meters affected, for the period since the last preceding test, then any previous registration, integration or recordings of such billing meter or meters affected shall be corrected to zero error for any part of the period since the last test which such error is known to have existed or which may be agreed upon in actual practice by the operating representatives of the parties. In case the period of such error is not known definitely or is not agreed upon, such correction shall be for a period of one-half (½) of the time elapsed since the date of the last such test, but not exceeding a correction period of sixteen (16) days.

7. Each party shall preserve for a period of at least —— years all test data, charts and other similar records applicable hereunder.

Measurements:

1. Computation and or integration of quantities shall be in accordance with standard industry practice.

2. The sales unit of the gas deliverable hereunder shall be (1) one Mcf of gas, (2) one pound of gas, or (3) one dekatherm of gas.

3. The (1) Volume (2) Weight or (3) Energy of the gas delivered hereunder shall be determined as follows:

a-1) The unit of Volume for the purpose of measurement shall be one (1) cubic foot of gas at sixty (60) degrees Fahrenheit temperature and at a pressure of 14.73 —— pounds per square inch absolute.

a-2) The unit of Weight for the purpose of measurement shall be one (1) pound mass of gas.

a-3) The unit of Energy for the purpose of measurement shall be one (1) Btu ——.

b) The average atmospheric pressure at the point of measurement shall be assumed to be ——— ——— pounds per square inch, irrespective of actual elevation or location of the point of delivery above sea level or variations in such atmospheric pressure from time to time.

c) If meter or meters requiring flowing gas temperature determination are used the temperature of the gas passing the meters shall be determined by the use of a continuous recording or integrating temperature device or devices installed so as to properly record or integrate into the computations the temperature or the effect of the temperature of the gas folowing [sic] through the meters. The arithmetical average of the temperature recorded during periods of gas flow only shall be used when computing gas volumes.

d) If meters requiring the determination of the gas specific gravity are used, the specific gravity of the gas delivered hereunder shall be determined by the continuous use of a recording gravitometer, unless in actual operation the representatives of the parties hereto unanimously agree to the use of an accumulative gas sampling method, a spot test method, or molecular weights ratio. If a method other than continuous recording of the specific gravity of the gas is used, the specific gravity shall be determined ———— or as much more often as found necessary in practice. The specific gravity determined by any specific test shall be made effective ———— and shall remain in effect until superseded by the next regular or special test.

4. When an undisputed error of appreciable quantity is found to have occurred in the computations of any billing gas quantities, equivalent adjustments shall be made to compensate for such error upon request by either party providing such request is made within —— months after the end of the monthly billing period in which such error occurs.

CHECKLIST FOR CONTRACT QUALITY CLAUSE

NOTE: The quality specifications suggested below are most applicable to fuel quality natural gas as procured from various sources at or near the producing fields to be transported by natural gas transmission companies for resale to gas distribution companies, etc.

Selective use of the optional wordage offered in the following clauses is necessary in order that the peculiarities of each individual contract might be served. Blanks have been left for filling in values agreed upon where they differ

from those offered. No contract should be prepared without consulting an attorney.

1. *Natural Gas*: The gas delivered hereunder shall be natural gas of the quality and composition produced by nature in the petroleum, oil, and natural gas fields from which Seller directly or indirectly obtains its supply, with only such processing being required as may be necessary to condition the gas to meet the quality specifications hereunder.

2. *Heating Value*: No natural gas delivered hereunder shall have a "total heating value" at Point of Delivery below ——— British Thermal Units (Btu) per cubic foot of the gas (assumed to be dry) (assumed to be saturated with water vapor) at a temperature 60° Fahrenheit, and under a pressure of (14.73) psia. The average total heating value of the gas shall be determined for any billing period by method or methods agreed upon between the operating representatives in actual practice.

3. *Absence of Impurities*: Seller recognizes its obligation to provide fuel quality natural gas containing the least concentrations of separable materials which is economically feasible:

The gas delivered hereunder:

a) shall be commercially free from duct, gum, gum forming constituents, and liquids at the pressure and temperature at which the gas is delivered.

b) shall have no more condensible hydrocarbons in free liquid form than that which constitutes a wetting of the pipe walls in the lines on the inlet side of any pressure reducing regulator in the delivery facilities, or in the absence of such regulator no more such free hydrocarbon liquids shall be present in the piping at the point of delivery than that which constitutes a mere dampening of the pipe walls.

c) shall not contain more than a trace indication of oils and other liquids which are employed in the operation of the seller's gas processing and compression facilities.

d) shall not have a water vapor content in excess of .006 ——— pounds of water vapor per thousand cubic feet of gas at a base pressure and temperature of (14.73) psia and 60° F. The water vapor should be determined by the use of dew point apparatus approved by the Bureau of Mines or by any other method that is mutually agreeable.

e) shall not contain more than —— grains of hyrdogen sulfide per 1000 cubic feet of gas volume as determined by the Tutweiler test or some other quantitative test, mutually agreeable to both parties, after the presence of hydrogen sulfide has been indicated by qualitative test.

f) shall not contain more than 100 —— grains of total sulfur per 1000 cubic feet of gas volume, in addition to any sulfur compounds contributed by gas odorants which may have been added to the gas.

g) shall not contain in excess of:
(2.0) —— % by volume of carbon dioxide;
(0.2) —— % by volume of oxygen; or
(0.2) —— gallons per Mcf of gas, of those certain liquefiable hydrocarbons whose molecular weight is equal to or heavier than pentanes, commonly referred to as natural gasoline, as determined by fraction analysts or some other method mutually agreeable to both parties.

h) shall not have temperature of more than (120) —— ° Fahrenheit.

4. All measurements of gas required in this Article shall be expressed at a base temperature of sixty degrees

(60°) Fahrenheit and except as otherwise specifically provided to the contrary herein shall be at a base pressure of fourteen and seventy-three hundredths (14.73) pounds per square inch absolute.

5. *Odorization*: No odorant shall be added to the gas for the specific purpose of this contract. If Seller for any reason odorizes the gas stream from which the gas hereunder is delivered, such odorization is not to be construed as interfering with the merchantability of the gas delivered hereunder.

6. *Failure to Conform to Specifications*: If the gas offered for delivery hereunder shall fail at any time to conform to any of the quality specifications herein set forth, then Buyer shall notify Seller of such deficiency and may, at its option, refuse to accept further delivery pending correction by Seller.

NOTES

Only those items ordinarily found in the Gas Measurement and Quality Clauses of the standard form Gas Contract have been named in this Report although other contract items have a bearing on gas measurement activities. Among such items are the term of the contract; definition of a contract day, month and year; the point of delivery; the delivery pressure; contract quantity; unit price and billing, etc.

Brevity has been employed in this first edition of the A.G.A. Gas Contract Measurement and Quality Clause Report to encourage brevity in contract clause language. It is felt that the national standard base pressure and perhaps other essential items appearing in gas contracts will eventually be standardized making it possible to relate to the industry a complete set of accepted specifications in some future edition of this Report.

In early considerations relative to the Measurement Committee's plan to add gas contracts to its list of regu-

lar published reports, the consensus was that the primary objective of the intial [sic] report should be to serve as a sounding board to aid in refining the technique of reporting on this particular subject.

Those who have questions or suggestions should address correspondence to the Chairman, Measurement Committee, American Gas Association, at the address given on the front page of this publication.

APPENDIX H

GENERAL ORDER
No. 58-B
(Supplemental to General Order No. 58-A)

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

STANDARDS OF CALORIMETRY FOR GASEOUS FUELS

Approved December 28, 1955—Effective January 17, 1956

(Decision No. 52401, Case No. 4720)

IT IS HEREBY ORDERED that the following rules be adopted, effective January 17, 1956, to govern all gas corporations as defined in the Public Utilities Code,[1] in the determination of heating values of fuel gases. This order is supplemental to General Order No. 58-A, which requires utilities to provide and maintain calorimeter testing stations, and shall not relieve any gas corporation from complying with the provisions of General Order No. 58-A.

The order herein comprises the following sections and appendix:

1. Applicability of Rules
2. Deviations from Rules
3. Definitions of Terms
4. Types of Calorimeters
5. Standards for Recording Calorimeters

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[1] "Gas corporation" includes every corporation or person owning, controlling, operating, or managing any gas plant for compensation within this State, except where gas is made or produced on and distributed by the maker or producer through private property alone solely for his own use or the use of his tenants and not for sale to others. Gas corporations are also herein referred to as "utilities" or "gas utilities."

6. Standards for Water-Flow Calorimeters
7. Minimum Requirements

Appendix 1, Standard Method for Installing, Operating, Testing and Maintaining Recording Calorimeters Manufactured by Cutler-Hammer, Inc.

1. Applicability of Rules

a. The following rules shall apply to any person, firm or corporation now or hereafter engaged as a public utility in the business of furnishing manufactured gas, natural gas, hydrocarbon gas, or a mixture of fuel gases for domestic, commercial, industrial or other purposes within the State of California where the gas service rendered is subject to the jurisdiction of the Public Utilities Commission of the State of California.

b. When a change is desired in the type of calorimeter to be used at a given calorimeter station a request shall be made to the Commission by the utility, briefly stating the authorization sought, the type of calorimeter presently being used at the calorimeter station, the type of calorimeter desired to be used at the station in the future, and the major reason for making the change.

2. Deviations From Rules

In no case shall any public utility deviate from the methods herein set forth except with special written authorization from the Commission. If hardship results from the application of any rule herein prescribed because of special conditions, application may be made to the Commission for authorization to deviate therefrom. Such request for deviation authority shall set forth a complete justification of the proposed procedure.

3. Definitions of Terms

a. Fuel Gas

Any combustible gas or vapor, or combustible mixture of gaseous constituents, used to produce heat by burning.

b. Fuel Gas Calorimeter

An apparatus for determining the calorific (heating) values of fuel gases.

(1) Recording Calorimeter

An automatic device that continuously makes a written record of the heating value of a fuel gas or mixture of fuel gases on a chart.

(2) Water-Flow Calorimeter

A laboratory device for measuring the total and/or net heating value of a fuel gas or mixture of fuel gases in which the heat evolved by the complete combustion of a measured quantity of gas burning at a uniform rate is absorbed by a quantity of water also flowing at a uniform rate. The weight and increase in temperature of the water flowing during the interval that the measured quantity of gas is being burned furnish the primary data necessary for calculating the heating value of the gas.

c. Calimeter Station

The location at which a calorimeter is maintained for the purpose of determining the heating value of a fuel gas.

d. Standard Temperature

60° F., based on the international temperature scale.

e. Standard Pressure

The absolute pressure of a column of pure mercury 30 inches in height at 32° F. and under standard gravity (32.174 ft./sec.^{2}) or (980.665 cm/sec.^{2})

f. Standard Cubic Foot of Gas

The quantity of gas which, when saturated with water vapor and at a temperature of 60° F. and under a pressure of 30 inches in height of mercury at 32° F. (density 13.5951 grams/cc and acceleration of gravity 980.665 cm/sec.^{2}) occupies one cubic foot.

g. Dry Cubic Foot of Gas

The quantity of gas which, when free of water vapor at standard temperature and under standard pressure will fill a space of one cubic foot. The total heating value of one dry cubic foot of gas is equal to the product of the total calorific value per standard cubic foot and the constant 1.0177.

h. British Thermal Unit (Btu)

The quantity of heat that must be added to one avoirdupois pound of pure water to raise its temperature from 58.5° F. 59.5° F. under pressure.

i. Total Calorific Value

The number of British thermal units evolved by the complete combustion, at constant pressure, of one standard cubic foot of gas with air, the temperature of the gas, air and products of combustion being 60° F. and all of the water formed by the combustion reaction being condensed to the liquid state.

j. Net Calorific Value

The number of British thermal units evolved by the complete combustion, at constant pressure, of

one standard cubic foot of gas with air, the temperature of the gas, air and products of combustion being 60° F. and all of the water formed by the combustion reaction remaining in the vapor state. The net calorific value of a gas is its total calorific value minus the latent heat of vaporization at standard temperature of the water formed by the combustion reaction. Latent heat of vaporization of water at 60° F. = 1057.8 Btu per lb. or 50.37 Btu per standard cubic foot.

k. Theoretical Air

The volume of air that contains the quantity of oxygen, in addition to that in the gas itself, consumed in the complete combustion of a given quantity of gas.

l. Excess Air

The quantity of air passing through the combustion space in excess of theoretical air.

m. Combustion Air

The air passing into the combustion space of the calorimeter (theoretical air plus excess air).

n. Products of Combustion

All substances resulting from the burning of gas with its theoretical air, including the inert constituents of the gas and the theoretical air, but excluding excess air.

o. Flue Gases

The products of combustion remaining in the gaseous state, together with the excess air.

p. Certified Natural Gas

A sample of natural gas of certified heating value. The sample must be of constant composition and heating value and contain no condensibles that will

effect a change in its heating value with any temperature-pressure conditions to which the gas may be subjected.

q. Standard Hydrogen Gas

Hydrogen gas generated by the reaction of water on hydrone, an alloy of sodium and lead. (Purity approximates 99.94 per cent hydrogen.)

r. Reference Hydrogen Tank Gas

Hydrogen gas of commercial quality and purity stored in a tank or cylinder at high pressure, the heating value (theoretical scale reading) of which has been determined with standard hydrogen gas.

s. Reference Natural Gas

Natural gas of constant composition and heating value, the heating value of which has been accurately determined by use of certified natural gas or standard hydrogen gas. Such gas shall contain no condensibles that will effect a change in its heating value with any temperature-pressure change to which the gas may be subjected.

t. Condensate

The water that is condensed to the liquid state within the body of the calorimeter.

4. Types of Calorimeters

It is the intent of the Commission that this general order be applicable to all types of calorimeters; however, at the present time there are only two types of calorimeters in use of which the Commission approves. These are the recording and water-flow types. Each type is being manufactured only by a limited number of manufacturers. In the case of the recording calorimeter there is only one principal manufacturer, Cutler-Hammer, Inc., and in the case of the water-

flow type there are only a few manufacturers. Under these circumstances standards are provided or specified that treat specifically with the equipment produced by these manufacturers.

5. Standards for Recording Calorimeters

The standard methods for installing and operating recording gas calorimeters for determining the heating value (calorific value) of fuel gases applicable to the utilities using the Cutler-Hammer type of equipment are set forth in Appendix 1, attached to and made a part of this order.

6. Standards for Water-flow Calorimeters

a. The "Standard Method of Test for Calorific Value of Gaseous Fuels by the Water-Flow Calorimeter", published by the American Society of Testing Materials, ASTM Designation: D900-48, adopted 1948, is hereby prescribed as the approved method of the Commission for operating water-flow calorimeters by the gas utilities in the State of California.

b. The humidity correction procedure and the humidity control control procedure of the "Standard Method of Test for Calorific Value of Gaseous Fuels by the Water-Flow Calorimeter," are the approved standard procedures of the standard method and shall be adhered to in detail as each is described in publication ASTM Designation: D900-48, Adopted 1948.

c. Where a water-flow calorimeter is employed for making a heating value determination of a fuel gas no less than one set of duplicate heating value tests shall be made of that gas for each determination performed. The difference between the two heating value test results obtained shall not exceed 10 Btu per standard cubic foot. If a differ-

ence of 10 Btu per standard cubic foot is exceeded, additional heating value tests shall be run until two test results are obtained of a lesser difference than 10 Btu per standard cubic foot. The average of the first two test results having a lesser difference than 10 Btu per standard cubic foot shall be the accepted heating value test result for that determination.

7. Minimum Requirements

The requirements contained herein should be considered as minimum and any utility may adopt additional rules and practices provided they are not inconsistent with the provisions of this order.

Approved and dated at San Francisco, California, this 28th day of December, 1955.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

By R. J. PAJALICK, *Secretary.*

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APPENDIX I

LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES REQUIRED BY RULE 28.1

Pursuant to Rule 28.1, Petitioners list their parent companies, subsidiaries (other than wholly owned subsidiaries), and affiliates. This list is limited to entities with stock or debt securities publicly traded in the United States or Canada:

AMINOIL INC.

Aminoil Inc. (formerly Aminoil USA, Inc.) is a wholly owned subsidiary of R. J. Reynolds, Inc.

The subsidiaries (not wholly owned) of Aminoil Inc. are:

Solar Gas, Inc.
Long Beach Oil Development

AMOCO PRODUCTION COMPANY

Amoco Production Company is a wholly owned subsidiary of Standard Oil Company (Indiana).

The subsidiaries and affiliates (not wholly owned by Standard Oil Company (Indiana) or a wholly owned subsidiary) of Amoco Production Company are:

Amoco Australia Limited
Amoco Canada Petroleum Company, Ltd.
Amoco Credit Corporation
Amoco Oil Holdings S.A.
Amoco (U.K.) Exploration Company
Analog Devices Inc.
Cetus Corporation
Cyprus Mines Corporation

ARCO OIL AND GAS COMPANY

ARCO Oil and Gas Company is a division of Atlantic Richfield Company.

The subsidiaries and affiliates (not wholly owned) of Atlantic Richfield Company are:

Alyeska Pipeline Service Company
Anaconda-Ericsson Inc.
Anamax Mining Company
Atlantic Richfield de Mexico, S.A. de C.V.
Aughinish Alumina, Ltd.
Aughinish Estates
Aughinish Finance, Ltd.
Badger Pipe Line Company
Bingham Development Company
Black Lake Pipe Line Company
Blair Athol Coal Pty., Limited
Caribou-Chaleur Bay Mines Ltd.
Colonial Pipeline Company
Cook Inlet Pipe Line Company
Delaware Bay Transportation Company
Dixie Pipeline Company
East Texas Salt Water Disposal Co.
Eisenhower Mining Company
Flower Street Limited
F.T.L. Company Limited
Gravity Adjustment, Inc.
Hardy Oil Company
Hydrokem Performance Chemicals Company
Imperial Eastman de Mexico, S.A.
Iricon Agency Ltd.
Jamaica Alumina Security Company Ltd.
Kenai Pipe Line Company
Kuparuk Transportation Company
Las Quintas Serenas Water Company
Lavan Petroleum Co.
Mayflower Mining Company
R. W. Miller (Holdings) Limited
Minera Anaconda Limitada
Montoro, Empresa Para La Industria Quimica
New Bingham Mary Mining Company
Nihon Oxirane Company, Ltd.

Oil Shippers Service, Inc.
P. T. Arutmin Indonesia
Park Cummings Mining Company
Park Premier Mining Company
Participaciones Mexicanas, S.A. de C.V.
Platte Pipe Line Company
Productos Especiales Metalicos, S.A.
Sinclair Venezuelan Oil Company
Smoke House Copper Mining Company
Solvamex, S.A. de C.V.
Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company
Trans Mountain Oil Pipe Line Company
West Mayflower Mining Company
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Itmann Coal Co. (Pennsylvania)
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Colonial Pipeline Company (Delaware)
Dixie Pipeline Company (Delaware)
Explorer Pipeline Company (Delaware)
Lake Charles Pipe Line Company (Delaware)
Pioneer Pipe Line Company (Delaware)
Platte Pipe Line Company (Delaware)
Seadock, Inc. (Texas)
Texas Offshore Port, Inc. (Delaware)
West Shore Pipe Line Company (Delaware)
Yellowstone Pipe Line Company (Delaware)
Kettleman North Dome Assoc. (California)
Maritime Protection Inc. (New York)
Oil Shippers Service, Inc. (Delaware)
Petroleum Terminals, Inc. (Indiana)
Iricon Agency, Ltd. (Delaware)
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Chinhae Chemical Company, Ltd.
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Dixie Pipeline Company
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Harshaw Galvanotecnia S.A.—H/FP
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Harshaw/Filtrol Partnership—H/FP
Hochtemperatur Reaktorbeau GMBH
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Mobil Oil Exploration and Producing Southeast, Inc. and Mobil Producing Texas and New Mexico, Inc. are wholly owned affiliates of Mobil Oil Corporation.

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Aero Oil Company
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Industrieanlagen
Norpipe Petroleum UK Limited
Norsea Gas GambH
Quimica Venoco C.A.
Renalit—Fertighaus GmbH
Seadock, Inc.
Seaway Pipeline, Inc.
Spodco-USA, Inc.
Texas Offshore Port, Inc.
Venezoil, C.A.
Western Desert Operating Petroleum Company
Colonial Pipeline Company
Compagnie Francaise Du Carbon Black
Dixie Pipeline Company
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Oil Insurance Limited
Pioneer Equipment Co.
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Cortez Capital Corporation
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Explorer Pipeline Company
LOCAP, Inc.
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Albright & Wilson Match Phosphorus Company, Ltd.
Arndale Fuels, Ltd.
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Butler Oil Products Ltd.
Collins Pipeline Company
Depositas Del Norte, S. A.
HT Gathering Company
Intertractor Viehmann GmbH & Co.
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Kern Island Water Company
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Losenhausen Maschinenbau Ag
Marchon—Paragon Holdings (PTY) Ltd.
Marchon—Paragon Sulphonation (Cape) (PTY) Ltd.
Marchon—Paragon Sulphonation (PTY) Ltd.
Mistal Inc.
Monroe Auto Pecas S. A.
P.P.M. Guindastes Hidraulicos S. A.
S. A. Paper Chemicals Company (Proprietary) Limited
Societe Anonyme Industrille de Resines

Stoco Mutual Water and Sewer Company
Tees Storage Limited
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Office - Supreme Court, U.S
FILED
FEB 17 1984
ALEXANDER L. STEVAS
CLERK

Nos. 83-1171 and 83-1173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EXXON CORPORATION, *et al.*,
Petitioners,
v.
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *et al.*,
Respondents.

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,
v.
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF NAMED PIPELINE RESPONDENTS

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QUESTIONS PRESENTED

1. The Congress, in the Natural Gas Policy Act of 1978 (NGPA), granted detailed and explicit price increases relative to some categories of natural gas, and explicitly based the price limits for other categories upon prices previously set by the Federal Energy Regulatory Commission (FERC). Did the Court of Appeals err when it held that Congress did not, as the FERC claims, implicitly and without any indication in the language of the NGPA or legislative history thereof, substantially increase all such prices *further*, by changing the method of calculating the heat content of the gas from that which the FERC had required prior to, and for a period after, enactment of the NGPA?

2. Are petitioners correct in, and may they rely upon, their subsidiary contention in this Court that the NGPA gives the FERC discretion to decide which method of heat content calculation to utilize, when the FERC itself, particularly in the Court of Appeals, based its position upon a different contention; the claim that the *NGPA requires* use of a given method?

3. If it is assumed, arguendo, that the FERC has discretion under the NGPA to choose a heat content calculation method, did the Commission err, in the orders under review, in failing to provide proper notice and opportunity for comment, by not appropriately explaining and justifying its decision, by applying the changed policy therein retroactively, and by failing to provide for unconditional recovery, by the purchasers of the gas, of the prices increased by such method?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1171

EXXON CORPORATION, *et al.*,
Petitioners,

v.

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *et al.*,
Respondents.

No. 83-1173

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION OF NAMED PIPELINE RESPONDENTS *

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* This brief is filed by Interstate Natural Gas Association of America, an association of natural gas pipeline companies, ANR Pipeline Company (formerly Michigan Wisconsin Pipe Line Company), Natural Gas Pipeline Company of America and Transcontinental Gas Pipe Line Corporation, all Respondents below. It is also filed by Northern Natural Gas Company, Division of InterNorth, Inc. and Mississippi River Transmission Corporation, Intervenors below.

COUNTER STATEMENT OF THE CASE

The basic and dispositive issue in these proceedings is a question of statutory interpretation, concerning the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. §§ 3301-3342.

These proceedings involve the method to be used to determine the heat content of natural gas, which in turn is used to determine the maximum amount to be paid to producers for gas sold. The issues here do not involve contract interpretation or meaning. Rather, the question is the meaning of a statute; the NGPA. The issues here do not involve, as petitioners assert, technical questions of which method of measuring heat content is most accurate or mechanically acceptable, so no question of technical FERC, or industry, expertise is involved. Rather, the question is whether the Congress, when it prescribed maximum producer prices, in the NGPA, must be presumed to have intended to continue the heat content calculation procedure which the Federal Energy Regulatory Commission (FERC)[1] had required to be used for many years, including when the NGPA was enacted, or whether Congress should instead be presumed to have changed to another procedure, *without so indicating in any way, in the language or legislative history of the NGPA*. The effect of that change, claimed by Petitioners, would be to increase the maximum lawful prices set by Congress by an average of 1.7%.

Prior to the NGPA, the FERC, under the Natural Gas Act (NGA), 15 U.S.C. §§ 717-717w, fixed ceiling prices for producer sales of interstate gas, while prices for sales of intrastate gas were controlled by the states or not at all. The FERC established ceiling prices stated as so many cents per each one thousand cubic feet

[1] FERC is here used to include its predecessor agency, the Federal Power Commission.

(Mcf) of gas sold. However, by 1965 [2], pursuant to a 1961 Statement of Proposed General Policy,[3] the FERC provided that the per Mcf ceiling prices must be adjusted to reflect the heat content, measured in British Thermal Units (Btu), of the gas sold. That is, if the number of Btu's per Mcf of gas sold was more or less than the norm of 1000 Btu's per Mcf, the ceiling price was increased or decreased proportionately. Thus, if a method of determining the Btu content of the gas sold in a month produced a lesser number of Btu's than an alternative measurement method, the result was that the ceiling price (and thus the gross dollars received by the producer for the subject gas) would be less than under the alternative method. Therefore, the practical effect was that the ceiling prices fixed by the FERC were, in actuality, on a "per Btu" basis, arrived at in a two step process: state the price per Mcf and then adjust, pro rata, for Btu variation from the norm. Following *Texaco*, that "Btu adjustment" procedure was utilized in the various "area rate" and "national rate" proceedings which fixed the ceiling prices which were in effect, until adopted, and in some situations superseded, by the "maximum lawful prices" fixed by the Congress in the NGPA.[4]

The FERC's *Texaco* order also provided that the calculation of the Btu content of gas sold was made on a "saturated" (or "wet") method. (33 F.P.C. at 1237). That methodology reflects the actual technology of Btu

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[2] *Texaco, Inc.*, 33 F.P.C. 1228, 1237-38.

[3] Docket No. R-200, 26 Fed. Reg. 4614 (1961).

[4] See Area Rate Proceeding (Permian Basin Area), 34 F.P.C. 159, 223-224, 239, 240 (1965); Area Rate Proceeding (Southern Louisiana Area), 46 F.P.C. 86, 142-144 (1971); Just and Reasonable National Rates for Sales of Natural Gas, 52 F.P.C. 1604, 1650, 1651-1652 (1974); Just and Reasonable National Rates for Sales of Natural Gas, 54 F.P.C. 3090, 3123, 3124-3125 (1975); National Rates of Jurisdictional Sales of Natural Gas, 56 F.P.C. 2698, 2806, 2807-2808 (1976). In the 1965 Permian Basin, no adjustment for gas between 1000 and 1050 Btu's was allowed, while the later cases prescribed total proportional adjustment.

measurement, under which measurement is made on the basis of the standard assumption that the gas is saturated with water vapor. The FERC noted, in *Texaco*, that "this standard is accepted by the American Society For Testing Materials and the Natural Gas Industry." 33 F.P.C. at 1237. (*See* Appendix A for the text of the FERC's Statement of Policy which expresses this concept and shows ceiling price adjustments resulting from Btu variation from the 1000 Btu norm.) The "wet" method of Btu calculation was carried forward through all of the above referenced "area rate" and "national rate" proceedings (footnote 4, supra), and Section 2.56a of the FERC's existing Regulations (18 C.F.R. § 2.56a (c)(1) and 18 C.F.R. 2.56b(d)(1)), which was adopted in 1971, still specifically prescribes the "saturated" (wet) method, using the language adopted in *Texaco* in 1965. (*See* Appendix B for the text of such regulation.)

This continued requirement of the "wet" method has not been inadvertent. In Opinion No. 699-H, 52 F.P.C. 1604 (1974), the first national rate proceeding, the FERC specifically considered, and rejected, arguments by producers of gas (including Petitioners here) that the Btu content of gas should be measured on an alternative "as delivered" (or "dry") basis, rather than the "saturated" (or "wet") basis, for payment purposes. In that proceeding, the FERC stated:

> The Producers argue that the heating content (Btu) 'of the gas should be adjusted for the water vapor content in the gas as it is delivered.' In *Texaco, Inc.*, the Commission determined that Btu adjustments should be made *on the saturated basis. This* is the basis which was utilized in the area rate proceedings, and *is the basis that will be adopted in this proceeding. Id.* at 1630 (emphasis added, citations omitted).

Thus, the FERC required that the Btu price adjustment be made by the wet method set forth in Section 2.56 of the Commission's Regulations.

As a result of the above course of FERC and industry action, the situation at the time of the NGPA, in 1978,

was that for over thirteen years, federal policy for interstate gas—which was the sole focus of the NGA and the primary focus of the NGPA—was that allowable ceiling prices were on a per Btu basis, through the Btu adjustment, and Btu's were calculated by the wet (saturated) method.[5] That was the regulatory and industry policy when the NGPA was enacted.

Specifically, the NGPA set up multiple categories of gas (Sections 102 through 109) and prescribed congressionally-fixed prices for gas covered by five sections, adopted the pre-existing FERC fixed "just and reasonable" ceiling price for three sections, and deregulated "Section 107 gas". Deregulation of additional categories in 1985 was also provided. Inflation price escalations over time were also prescribed for the various regulated categories. The maximum lawful prices were fixed in terms of dollars and cents per Btu, thus encompassing the two step FPC process in one step, with the same result: the ceiling price is expressed in terms of a price per Btu. The language of the NGPA does not prescribe the method by which the Btu's in a given package of gas are to be calculated: there is no reference to a "wet" or "dry" or "saturated" or "as delivered" basis. There is no indication of any congressional intention to change the "wet" or "saturated" basis of measurement which existed at the time of enactment of the NGPA. If Congress had changed such measurement basis to the "dry" basis, the result would have been an implicit ceiling price increase in each category of gas of about 1.7%, on average, which would have been in addition to the explicit price increases prescribed by the NGPA.

On November 15, 1978, two weeks before the provisions of the NGPA were to be effective and required to be im-

[5] In the intrastate markets, which were not within federal oversight, practices as to Btu adjustment of prices, and Btu measurement methodology, depended upon contract terms and/or state requirements. The extent to which that involved deviation from the saturated method, if any, is not in the record herein, and is not known.

plemented, the FERC issued a "Notice of Proposed Rulemaking" in Docket No. RM79-3 (43 *Fed. Reg.* 53270 (1978)), proposing interim regulations to implement certain provisions of the NGPA, including a § 270.204 which is virtually identical to its then existing § 2.56a. Thus, the Commission then had two consistent regulations, one under the NGA and one under the NGPA, each of which called for Btu measurement *on a saturated basis.* That 1978 regulation stated:

> For purposes of determining the number of Btu's per unit volume of natural gas, the Btu content of one cubic foot of natural gas is the number of Btu's produced by the combustion, at constant pressure, of the amount of gas which would occupy a volume of 1.0 cubic foot at a temperature of 60 degrees Fahrenheit, *saturated with water vapor* and under a pressure equivalent to that of 30.00 inches of mercury at 32 degrees Fahrenheit, and under standard gravitational force (980.665 centimeters per second squared) with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of the gas and air and when the water formed by combustion is condensed to the liquids state. 43 *Fed. Reg.* at 53333 (emphasis added).

This proposed regulation, adopted by the Commission, effective December 1, 1978, gave no suggestion, in the above language or accompanying order, that the Commission proposed to *change* its prior Btu measurement practice, as the Commission now claims it did. In fact, all parties, including a number of gas producers, believed that the FERC regulation continued to provide for measurement of Btu content on a saturated basis, as the language of the interim regulation clearly states, and sought judicial review as a result.[6] That regulation constitutes

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[6] Application of Indicated Producers for Rehearing, FERC Docket No. RM79-3, filed February 2, 1979. The Commission denied this application without comment in its "Order Granting in Part and

[footnote continued on next page]

the FERC's contemporaneous interpretation of the NGPA relative to the issue here.

Over 19 months later, after comments, the Commission issued a final version of § 270.204, which was somewhat changed in format, but the same in substance as the earlier version *and continued to require the "saturated" method.* (Order No. 93, 45 *Fed. Reg.* 49077, July 23, 1980).[7] But the text of the *order* says, in a few sentences, that the Btu content, for maximum price purposes, was to be computed on the "as delivered basis", rather than the historically used saturated basis. This alleged "clarification", a major change in Commission policy, was done without elaboration, and was not reflected, in any way, in the actual regulation which was promulgated by that same Order. Nine months later, on April 24, 1981, rehearing was denied, by Order No. 93-A, 15 F.E.R.C. ¶ 61,075 (1981). That order on rehearing

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Denying in Part Applications for Rehearing of the Interim Regulations", on April 19, 1979 in FERC Docket No. RM79-3. In Ecee, Inc. v. FERC, No. 79-1171, 611 F.2d 554 (5th Cir. 1980), the producers again asserted, in seeking judicial review, that the Commission had improperly adopted the "saturated" basis for measuring Btu content. This issue was mooted, however, before the issuance of a decision in Ecee, because of the issuance of Order No. 93 by the Commission.

[7] The text of the regulation adopted in Order No. 93 read:

§ 270.204 *Btu content per cubic foot of natural gas.*

(a) *Measurement.* The Btu content of one cubic foot of natural gas *under the standard conditions specified in paragraph (b)* of this section is the number of Btu's produced by the complete combustion of such cubic foot of gas, at constant pressure with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of the gas and air and when the water formed by such combustion is condensed to a liquid state.

(b) *Standards conditions.* The standard conditions for purposes of paragraph (a) of this section are as follows: The gas is *saturated with water vapor* at 60 degrees Fahrenheit under a pressure equivalent to that of 30.00 inches of mercury at 32 degrees Fahrenheit, under standard gravitational force (980.665 centimeters per second squared). Emphasis added.

was the Commission's first claim that it had earlier intended to adopt a dry measurement rule. It also provided, for the first time, that the rule would be retroactive to December 1, 1978. As a result, consumers would be required to make hundreds of millions of dollars of retroactive payments. (Now, in 1984, that amount has grown to one or more billion dollars.) It was not until December 24, 1981, after FERC requested remand by the Court of Appeals, that the FERC amended § 270.204 by adding a new subsection (c):

> (c) *Application of the maximum lawful price.* The maximum lawful price prescribed by the NGPA and this part for any first sale of natural gas applies to the Btu's actually delivered in that first sale.

Thus, the policy of determining the number of Btu's to which the price is to be applied by the "as delivered" measurement basis, rather than the formerly standard "saturated basis," was not incorporated as part of the Commission's regulations until December 24, *1981*, but the Commission is attempting to enforce it retroactively to December 1, *1978*.

On review, the Court below held that the NGPA precluded the FERC from changing the Btu calculation method previously employed: that Congress had explicitly stated the ceiling price changes which it wished to impose, and had not, *sub silentio*, imposed a further average 1.7% increase by changing the Btu method, without ever giving any indication that it did so or intended to do so. Rehearing was denied, requests for stay were granted and requests for extension of stay were denied, by the Court below.

SUMMARY OF REASONS WHY THE PETITIONS SHOULD NOT BE GRANTED

1. The most basic reason for denial of the Petitions for Certiorari in these proceedings is that the decision of the Court of Appeals is correct. It is an exercise of the basic judicial function of interpretation of statutory language. The Court below examined the complete record and exercised sound reasoning and research, fully taking into account the arguments of the Petitioners. As a result, there is no significant legal principle which was ignored or misapplied by the Court below, or which requires review by this Court.

The claim of Petitioners, stripped to its essentials, is that the Congress required a change to the dry method of Btu content measurement:

a. Even though there is *no* indication in the language of the NGPA or its legislative history that the Congress intended to do so;

b. Even though such step would have reversed and abandoned over thirten years of prior FERC practice, which required the wet method;

c. Even though use of the dry method would increase the maximum lawful prices which producers could charge for gas by about 1.7%, on average, over the prices specifically stated in great detail in the NGPA;

d. Even though the only method of Btu measurement with which the Congress and its draftsmen could reasonably have been familiar was the FPC-prescribed wet method, which had been in effect for over thirteen years.

It must be remembered that the NGPA, as to three categories of gas, actually adopted the "just and reasonable" ceiling prices which the FPC had earlier fixed, as the "maximum lawful price" under the NGPA. The NGPA provides that those prices are only to be changed by a carefully prescribed inflation adjustment. But having done that, Petitioners argue that Congress *silently* increased those prices by changing, without mention, the

wet Btu measurement method which the Commission had utilized along with those prices. That is simply not credible.

While the language of the NGPA is silent on Btu measurement, the limited legislative history which is relevant provides further support for the position that Congress did not change the prior wet measurement method.

It is a sound principle of law that prior practices—in this case, of the administrative agency which operates under the NGPA and industry practices—should not be presumed or interpreted to be changed, unless the statute clearly so provides.

The Court of Appeals properly recognized the above factors. The Court was also correct in fully considering, and rejecting, Petitioners' arguments which seek to draw support for the dry method from unconnected, irrelevant facts and incorrect inferences. In doing so, the Court gave full and proper deference to the FERC's decision, and the support advanced therefor, but simply found it not credible, not supported, and not consistent with the NGPA. The Court of Appeals recognized that the initial interpretation by the FERC, made contemporaneously with the NGPA, prescribed the wet method, and it was only in later orders that the change to the dry method was attempted. That fact strongly undercuts the FERC's present claimed interpretation of the statute.

2. The claim of Petitioners, now raised in this Court, that if the NGPA does not require the dry method of measurement, it at least permits the FERC to exercise "discretion" and impose that method upon purchasers and consumers of gas, is in error. Petitioners claimed no right to exercise such discretion in their briefs to the Court of Appeals. The FERC disavowed such right of discretion when it made its rule effective retroactively, stating that its rule was interpretative of the NGPA, rather than substantive. Thus, Petitioners are barred from making such claim now. Further, a change of

methodology which alters the prices prescribed by Congress, as the change to a dry method of measurement would do, is not within the FERC's authority under the NGPA.

3. Even if it were held that the FERC had and has discretion to change Btu measurement methods, its orders here under review would still be invalid on grounds the Court of Appeals did not reach:

a. Such orders provide no explanation or basis for such change of position on a discretionary basis: they concentrate on the erroneous claim that the NGPA requires such result. FERC's brief below disclaims the authority it now claims.

b. Those orders are invalid procedurally, in that they gave inadequate notice of the proposed change, did not allow proper opportunity to comment thereon, and did not provide adequately for recovery, by the pipeline purchasers of gas from their customers, of the increased costs which would be caused by change to the dry method. In addition, the FERC orders here under review provide for retroactive application of the change of policy, in violation of applicable law, with consequent loss to consumers, and to at least those pipelines not subject to FERC jurisdiction.

4. There is no conflict of decisions between Courts of Appeals to be resolved here, and none will occur in the future on the issue involved here.

5. The Court of Appeals decision does not cause administrative or regulatory burdens for the FERC or the industry: it simply continues the use of practices used by the industry for many years, pursuant to FERC direction.

REASONS WHY THE PETITIONS SHOULD NOT BE GRANTED

I. THE INTERPRETATION BY THE COURT OF APPEALS THAT THE NGPA REQUIRES CONTINUED USE OF THE WET METHOD OF BTU MEASUREMENT IS CORRECT AND NO SIGNIFICANT LEGAL ISSUES REMAIN FOR THIS COURT TO DECIDE

The language of the NGPA does not specify whether the Btu content of natural gas sold in the United States is to be measured on the pre-existing wet, or saturated, method which had been used in interstate commerce, pursuant to FERC regulation, for over thirteen years prior to the NGPA, or by the dry method proposed by Petitioners herein. The Court of Appeals, and the FERC before it, was thus faced with a question of statutory interpretation on the basis of the basic statutory scheme of the NGPA, the context in which the NGPA was drafted and enacted, and explicit legislative history. As shown earlier, the context of the Act was that since 1965, following a 1961 Statement of Proposed General Policy, the FERC had required use of the wet method of Btu measurement for all producer sales in interstate commerce. The Congress had, of course, dealt with natural gas in interstate commerce for many years, but not intrastate commerce. The NGPA substituted congressionally-set "maximum lawful prices" for FPC-set ceiling prices, and applied them to all gas sales by producers. In doing so, the Congress devised wholly new price ceilings for some categories of regulated gas, including intrastate gas, and adopted prior FERC-fixed prices for other categories of gas.

To accept the position of Petitioners herein, one must:

a. Accept the argument that the Congress expressly and explicitly chose those specific prices for all of the detailed categories of regulated gas which the NGPA creates, carefully devised an inflation adjustment to be applied to such prices over the years, and then implicitly, without ever mentioning it in the statute or the legisla-

tive history, tossed in another 1.7% price increase by silently changing the prior FERC Btu measurement method. That claim is not credible, and is inconsistent with the pattern of the NGPA.

b. Acceptance of Petitioners' thesis also requires the belief that when Congress expressly adopted, for some categories of gas,[8] as the NGPA prices, the actual ceiling prices previously set by the FERC, it also, without any mention in the NGPA or legislative history, effectively *increased* those prices by changing the Btu measurement method which the FPC had used in establishing those prices. The Court of Appeals correctly found that such claimed deviation from the NGPA's pricing scheme was contrary to the NGPA.[9]

c. Acceptance of Petitioners' position also requires one to ignore the fact that the FERC's initial rule, issued contemporaneously with the passage of the NGPA, called for the use of the *wet* method of Btu measurement. That was on November 14, 1978, between the November 9, 1978 enactment of the NGPA and its December 1, 1978 effective date. It was not until July 16, *1980*, that the Commission issued a brief, unexplained passage in an order, which indicated that a change to the dry method must be made. And it was not until April 24, *1981* that a longer attempt to explain such change was issued, and not until December 1, 1981 that the regulations were finally changed to provide for the dry method. Thus, the change which the FERC now claims was mandated by the NGPA was not recognized contemporaneously by the FERC: instead, the contemporaneous statutory construction was to the contrary. The Court of Appeals properly noted this at 716 F.2d at 6-9.

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[8] Sections 104, 106a and 109.

[9] It is also not credible that having adopted the Btu measurement used by the FERC, for those NGPA gas categories which are based on FERC just and reasonable rates, that Congress, without explanation, adopted a different Btu content measurement method for the other categories of gas. No one suggests that.

By maintaining the use of the wet Btu measurement method, the Court of Appeals holding is compatible with the context of the passage of the NGPA, and is fully compatible with—indeed, demanded by—the legal principle that a change in prior regulatory practices should not be inferred in statutory interpretation, unless the statute or its legislative history clearly indicates that such change was intended. Neither the language nor the legislative history of the NGPA provide for a change to the dry measurement methodology. Thus, a controlling principle is that stated in *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978):

> Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. [citations omitted] So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute. 434 U.S. at 581.

In the instant proceeding, the NGPA adopted the FERC's own ceiling prices for some categories of gas, and did *not* provide for a change of the Btu calculation method which the FERC had required be used with such prices.[10]

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[10] See Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973), where the Court noted that "The legislative history of that section reveals no mention of any intent on Congress' part to reverse the long standing practice of requiring federal employees to be U.S. Citizens." See also Ozawa v. U.S., 260 U.S. 178, 194 (1922), finding a claimed *sub silentio* change of prior policy to be not credible and City of New York v. U.S. Dept. of Transportation, 715 F.2d 732, 741 (2d Cir. 1983), stating there must be "explicit statutory language or other clear manifestation of Congressional intent" before it will be held to have made "such a basic change in regulatory procedure", and holding that such intent, as here, was not present. See also, Paul v. U.S., 371 U.S. 245 (1965), and Toilet Goods Association v. Finch, 419 F.2d 21, 27 (2d Cir. 1969), stating:

[footnote continued on next page]

Similarly, in *Watt* v. *Alaska*, 451 U.S. 259 (1981), this Court held that a statutory change did not allow the administering agency to change its long standing practices:

> The silence of Congress may provide a treacherous guide to its intent. *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 11, 86 L.Ed. 1229, 61 S. Ct. 875 (1942). Here, however, it is almost inconceivable that Congress knowingly would have changed substantially a long-standing formula for distribution of substantial funds without a word of comment. 451 U.S. at 271 (fn. 13).[11]

The fact that Congress did not affirmatively express a desire to change measurement methodology is enough to support the Court of Appeals decision. But here, as shown below, the legislative history goes further, to show that Congress was aware of the FERC's saturated method and expected that it would continue to be employed.

The FERC itself has admitted—indeed, urged—the validity of that principle, specifically relative to the NGPA, stating:

> The NGPA rests upon the prevailing industry practices rooted in the regulatory context that ex-

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> [I]t is a good principle that before a court will hold Congress to have made a basic change in regulatory procedures, legislators must either use plain language or give other clear manifestation of intent . . . . In the absence of this it is reasonable to assume that both those legislators who were knowledgeable and those who voted on faith wished to leave things as they were. (citation omitted).

See also, Bush v. Oceans International, 621 F.2d 207, 211 n. 4 (5th Cir. 1980), stating "a change in the status quo should not be inferred unless Congress has unmistakably indicated a wish to the contrary", and Laborers International Union v. NLRB, 567 F.2d 1006, 1013 (D.C. Cir. 1977), which states the principles almost identically.

[11] See also, American Textile Manufacturers v. Donovan, 452 U.S. 485 (1981).

> isted at its enactment. In short, the NGPA generally accepts the existent *status quo* of industry practices under the Natural Gas Act, and where a change was intended, Congress spoke clearly. (Mimeo, p. 10)[12]

At Mimeo page 16, the Commission also said "the NGPA can only be understood in the regulatory context that surrounded its enactment," at Mimeo page 12 said that the protestor's position "is based upon a misunderstanding of the NGPA and the historical backdrop that existed at the time the NGPA was enacted", and at Mimeo page 5, said that "[a]s we have seen in other contexts, Congress did not enact Title I on a blank slate, but in the context of prevailing practices under the Natural Gas Act." (footnote omitted) And finally, at Mimeo page 8, the FERC said "the Commission cannot assume, in the context of regulation under the *Natural Gas Act* and the prevailing economic climate in 1978, that Congress intended" to adopt the protestor's position. (emphasis added). In this case, the FERC errs by ignoring its own principles.

Some of the legislative history which supports the conclusion that Congress intended to continue the use of the FPC's wet method is cited by the Court of Appeals at 716 F.2d 12-13. The Report of the House Committee on Interstate and Foreign Commerce explained, relative to H.R. 8444, one of the bills which was consolidated and revised into the NGPA, that:

> The reference to FPC-determined just and reasonable prices and contract prices for purposes of determining maximum lawful prices under section 405 incorporates *Btu adjustments* and other quality adjustments provided for in *FPC rate determinations* or in the applicable contract. (Rep. No. 95-496, Part 4,

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[12] Declaratory Order in Docket Nos. GP82-50, GP82-51 and GP82-52, relating to pipeline transportation of producer-owned Liquids and Liquid Hydrocarbons, 22 F.E.R.C. ¶ 61,013 (January 17, 1983). A copy thereof has been filed with this brief, for convenience.

95th Cong., 1st Sess. 103 (1977) (footnote omitted, emphasis added).[13]

The above passage shows that in 1977, while Congress was working on the overall legislation which emerged in 1978 as the NGPA, Congress knew of the FERC Btu adjustments and intended that they be subsumed as a part of the price set. All that the FERC's Petition can say in response to this direct evidence of legislative intent is that the reference to the "contract" "might" refer to what Petitioners claim is the "many intrastate contracts" which provide for the dry method. However, the record does not show whether the dry method was actually used in intrastate commerce or, of course, to what extent. What is uncontroverted is that there is more interstate gas than intrastate gas, and *all* interstate gas, and *at least* a substantial part of intrastate gas, was measured on the wet method. Thus, the reference to "FPC rate determinations" was entirely to the wet method, and references to "contract" was *at least* largely to the wet method.[14]

The above legislative history in support of the wet method is also supported by 124 Cong. Rec. 38364 (1978), where Congressman Dingell stated that the "maximum lawful price" under the NGPA "*would be based upon the just and reasonable rate which, but for*

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[13] It should also be noted that the same references to use of "Btu Adjustments" as "provided for in FPC rate determinations" appears in the legislative history of H.R. 6831, a slightly earlier forerunner of the NGPA. Rep. No. 95-543, Vol. 1, at 3. 95th Cong., 1st Sess.

[14] To conjecture that Congress, which had previously dealt with interstate, not intrastate gas, was even familiar with the Btu measurement method *perhaps* used by *some* part of the smaller intrastate market, much less abandoned the interstate wet method which was used for the bulk of the gas nationally, is not supportable. Thus, the Court of Appeals' rejection of that conjecture is correct. The Court of Appeals was being accurate, albeit conservative, when it stated (716 F.2d at 12) that the wet method was the only one with which Congress was "likely" to have been familiar, and the support expressed by that Court for that careful statement is sound.

enactment of this legislation, would have been applicable." (emphasis added). Similarly, at 124 Cong. Rec. 29108-9 (1978), Senator Jackson agreed that the "just and reasonable rates set by the Federal Power Commission and in effect, as of April, 1977 are *frozen* as of that date" except for the inflation adjustment. (emphasis added) Neither Congressman indicated any change in the Btu measurement methodology used by the FERC under the NGA, which would increase prior prices.

In attempting to attack the use by the Court of Appeals of the available legislative history, the FERC Petition (p. 15) makes the statement that the Court of Appeals "overlooked the fact that, prior to the NGPA, the Commission consistently had expressed the applicable NGA rates on a 'per Mcf' basis, with allowance for a Btu adjustment, not on a 'per MMBtu' basis." But as explained earlier, expressing a rate "on a 'per Mcf' basis, *with allowance for Btu adjustment*", is exactly the same as expressing it "on a 'per MMBtu' basis." To say, as the FERC does, "not on a 'per MMBtu' basis" is to incorrectly suggest otherwise, which tries to deny the most basic fact in this case: that the FERC used the wet method, with prices adjusted to a Btu basis, before the NGPA,[15] and the NGPA was passed in that context. The NGPA even adopted FERC prices for some categories of gas, which prices were prescribed on the basis of wet measurement.

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[15] Suggestions by Petitioners that the practice of the FERC of using the wet method was simply a "quality" measure, and was to induce delivery of high Btu gas (see, for example, FERC Br. at 4, 5 and 17) support our point. The "Btu adjustments" under the NGA caused Btu content to affect price, and not just quality control, and the Btu measurement method which was used, and found to be compatible with any desired "incentive" to producers, was the wet method. It was sufficient then, and is now. Further, contrary to Petitioners' vague statements, those Btu adjustments were precisely made, pro-rata to Btu's, and were applied to the applicable ceiling prices which the FERC prescribed for each category of gas, just as the NGPA does by stating prices in per Btu terms.

Petitioners' other arguments were also fully considered, correctly analyzed and properly rejected by the Court of Appeals. They claim that the "as delivered" method (Petitioners' term) matches NGPA's reference to "natural gas delivered during any month". The Court of Appeals properly analyzed and dismissed that word game at 716 F.2d 10-11, holding:

> In short, the Commission fails to convince us of any necessary connection between the delivery point at which the price of gas is fixed and a 'dry' determination of Btu content. Indeed, the Commission itself has established that a 'wet' measurement of Btu content was properly used during rate determinations under the NGA, despite the fact that the underlying NGA commodity unit was also measured on an 'as delivered' basis. *See* Order 93-A at 13.

The other claim of Petitioners is that the use by the NGPA of per Btu prices requires the most "accurate" method of Btu measurement. But that claim overlooks the fact, shown earlier, that prices under the *NGA* were *also* on a per Btu basis, because of the Btu adjustments to ceiling prices required by the FERC, and it was also the *wet* method of measurement which was used in conjunction with those prices. What is necessary is that when one of the Btu measurement methods is adopted, it is made certain *that the per Btu ceiling prices are adopted in recognition of how the Btu's are to be measured.* That is what the FERC did, before the NGPA, when it adopted the wet method and set ceiling prices accordingly. The NGPA adopted those same prices for some categories of gas, and fixed compatible prices for the other categories of regulated gas, and it is therefore not credible that Congress silently switched only the Btu measurement method, thus changing the premises upon which the adopted prices had earlier been based. The Court of Appeals properly recognized this fact, and also recognized correctly that use of prices expressed in Btu's does not decide which method of measuring Btu's is to be

used, as Petitioners erroneously claim. (716 F.2d at 12-14).

The Court of Appeals also dealt at length with Petitioners' claims that even though the wet method was the one utilized by the FERC, it was not sufficiently "accurate" to have been utilized by the Congress. The Court of Appeals noted that although the NGPA sets precise prices, subject to inflation adjustments, the Congress not only knew that the wet method had been used, but also knew that full precision in other areas could not last past the date of enactment. For example, although an effort was made to allow some gas prices, at the time of enactment, to move nearer to the price of other fuels, it was obvious that there would be regional differences, since the prices of unregulated fuels—such as oil or coal—vary from area to area, whereas the NGPA sets nationwide gas rates. Further, the NGPA has multiple categories of gas, whereas other fuels generally do not. Additionally, whereas unregulated fuel prices change with market conditions, NGPA prices do not. In that regard, the Court of Appeals properly noted (716 F.2d at 14) that the final version of the NGPA did not contain a provision from earlier drafts which would have indexed the NGPA prices to domestic oil prices, which is another showing of international lack of precision in the NGPA, as enacted. As the Court of Appeals also noted (716 F.2d at 14), the Congress was not even "hyperaccurate" in its mathematics, since in a companion bill to the NGPA, Congress expressed a willingness to assume generally that each barrel of oil has 5.8 million Btu's, when in fact the Btu content varies with the type and quality of the particular oil in question. The Court of Appeals also noted that Congress at times referred to one million Btu's (MMBtu) and a thousand cubic feet (Mcf) of gas as equivalent, when in fact an Mcf may have more or less than a million

Btu's.[16] The Court of Appeals' point is not, as Petitioners' claim, that Congress did not know the difference between volume (Mcf) and heat content (Btu),[17] but rather that Congress felt the need to adopt simplying assumptions and did not try the impossible task of pushing accuracy to the decimal places. In that context, as the Court of Appeals correctly reasoned, Congress looked not to the degree of "accuracy" of Btu methods, but rather to the compatibility of the method with the prices which Congress selected: Congress did not select and state prices which had been developed on the basis of the wet method,

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[16] These references by the Court of Appeals are to the committee report accompanying the Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat. 3174-3205 (1978). The producer Petition (p. 22) states that the "provisions" referenced "were contained only in a House version of that legislation" but that the Act "as enacted, does not contain these provisions." But that is grossly misleading, because the passages cited were not in the *act* at all, but in the committee *report*, so of course they were not in the act "as enacted". And the presence of the language in the report does show, as the Court of Appeals recognized, that Congress did intend to use standard assumptions, such as are involved in the wet method of measurement. In addition, the same assumption of rough equivalence in Btu's of an Mcf and one million Btu's also was made by House Commerce Committee Chairman Dingell, in discussing NGPA pricing sections, when he sometimes referred to NGPA prices in terms of dollars and cents *per Mcf, rather than per MMBtu*, again showing the Congressional assumption of rough Btu equivalency of a Mcf and one million Btu's. 124 Cong. Rec. H. 13117 (October 14, 1978). Further, the same reference was made in Ad Hoc Committee on Energy, Report to accompany H.R. 8444 H. Rep. No. 95-543, Vol. 1, 19 (July 27, 1977) and in a House Staff outline of the pricing proposals which resulted in the NGPA pricing provisions, issued March 8, 1978.

[17] At page 16 of its Petition, the FERC misleadingly suggests that the Court of Appeals said that Congress, to quote the Petition, "intended 'Btu' and 'Mcf' to be interchangeable". Of course, the Court of Appeals never said that: it simply pointed out the simplifying assumption of the Congress that each Mcf had 1000 Btu's of heat content, so that an Mcf would have *equivalent Btu's* to an *MMBtu* (not a Btu).

and then effectively changed them by secretly switching to the dry method, without saying so.[18]

Because the statutory scheme of the NGPA, the regulatory context in which the NGPA was enacted, and the relevant legislative history, all support the decision of the Court of Appeals, certiorari should be denied.

II. PETITIONERS ERR IN RELYING ON ARGUMENTS THEY DID NOT BRIEF TO THE COURT OF APPEALS AND WHICH ARE CONTRARY TO THE RATIONALE OF THE ORDERS UNDER REVIEW

The change of Btu calculation method which the FERC adopted, and the Court of Appeals reversed, was not done by the FERC as a matter of discretion, or exercise of technical competence. Instead, as the FERC's briefs in the Court of Appeals make clear, the FERC rested totally on its interpretation of the NGPA: the FERC has consistently said that it had no discretion, but instead acted pursuant to statutory mandate. Indeed, as the Court of Appeals pointed out (716 F.2d at 15), not only is the FERC's "technical experience with measuring Btu's" "of limited usefulness" in determining what Congress meant in setting ceiling prices for natural gas on a Btu basis, but the FERC itself conceded, at page 28, n.28 of its brief to that Court, that:

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[18] Thus, the FERC Petition's footnotes 13 and 14 (page 16) are irrelevant and misleading, since they do not proceed from what the Court of Appeals really said. Similarly, footnote 12 (page 12) of the FERC Petition draws conclusions from mathematical exercises *which are based on a premise which assumes the answer to the issue in this case*, because that footnote implicitly assumes that the measurement result which is reached by use of the dry method is "correct", and therefor what Congress intended, and then shows that the wet method does not reach that result. But the issue here is, rather, whether Congress intended to change to a dry basis, to be applied to prices which were set in light of the wet basis of measurement: it is incompatibility of Congressional and regulatory purpose, which Petitioners claim occurred, not technical techniques and accuracy of measurement, which is involved here.

> "Indeed, the Commission was given no independent authority under the NGPA to define 'Btu'."

Now, however, the FERC in its Petition here (pages 18-19, point 3) argues that:

> Even assuming that the 'as delivered' rule was not mandated by the NGPA, we submit that, at the very least, Congress left the matter to the ultimate discretion of the Commission.

On the merits, that post-hoc position is in error, as shown above. The FERC's position below is correct: it has been left no discretion by Congress. But in addition, the FERC cannot now be heard to take that new position, in view of its position taken in the Court of Appeals.[19] *See U.S.* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977) referring to an issue not raised below and stating "[a]bsent exceptional circumstances, we will not review it here". *See also Illinois* v. *Lance Gates*, 51 U.S.L.W. 4709 (June 8, 1983); *Duigan* v. *U.S.*, 274 U.S. 195, 200 (1926); *Neely* v. *Eby Construction Co.*, 386 U.S. 317 (1967).[20]

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[19] Indicated Producers also make the same claim in their Petition, and similarly cannot take the contrary position here. In their brief in the Court of Appeals, they made no suggestion that the FERC had any discretion to choose a Btu method: there was, instead, only pages of argument that the *NGPA mandated* use of the dry method. (A copy of the FERC and Producers briefs in the Court of Appeals have been filed with the Clerk of this Court, for convenience.)

[20] Similarly, in none of its orders, except No. 93-A, did the FERC give any reasons for its change of position. And examination of Order 93-A shows no exercise of expertise, but rather discussion of reasons why the NGPA allegedly supports a change of measurement method. Thus, the principles of SEC v. Chenery Corp., 332 U.S. 194, 196 (1946), stating that the action of an administrative agency is to be judged "solely by the grounds invoked by the agency," are relevant. Further, "[t]he Courts may not accept appellate counsel's post hoc rationalizations for agency action;" Burlington Truck Lines v. U.S., 371 U.S. 156, 168 (1962); NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438, 443-444 (1965). See also American Textile Manufacturers v. Donovan, 452 U.S. 485 (1981). In this case, such post hoc rationalization is exhibited before this Court.

Clearly there are no "exceptional circumstances" in this proceeding to warrant allowing petitioners to here raise new issues.

It is obvious why the FERC and producers argued in the Court of Appeals that the NGPA required use of the dry method: they wanted to wrap themselves in a claimed Congressional mandate. If they had instead argued that the FERC had exercised discretion, then they would have been faced with the invalidity of the FERC orders on the bases described in Section IV, below: lack of basis shown for such "exercise", and equally invalidating procedural defects. Petitioners' entire argument in response to inadequate notice and opportunity for comment, and retroactive application of the dry method, was the claim that they were simply interpreting the statutory *mandate*. But now, faced with reversal by the Court of Appeals' opinion, Petitioners seek to assume a fallback position that although the NGPA does not mandate the dry basis, the FERC has "discretion" to adopt it. Even if Petitioners were allowed to argue discretion, the FERC orders here under review are, we submit, nevertheless invalid on the bases described above and in Section IV, including the fact that no basis for exercise of discretion is stated in the FERC orders.[21] To have such invalidity judicially determined, this case would presumably be remanded to the Court of Appeals, which was not required to reach those questions. If that court held the FERC orders invalid on the bases set forth in Section IV hereof, then

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[21] At page 19, the FERC Petition alleges that the Court of Appeals "did not even attempt to make" a finding that such alleged FERC exercise of discretion was invalid: did not find "the Commission's action in issuing the Btu rule was arbitrary, capricious, or an abuse of discretion". The reason such terms were not used by the Court of Appeals is that the FERC, and the producers, did not claim the exercise of, or right to exercise, discretion: they claimed statutory mandate only. In view of that situation, Petitioners below (Respondents here) also did not deal with the question of whether the FERC exercised discretion lawfully: that question was not—and is not now—relevant or properly raised.

the FERC, if it wished to then exercise its alleged "discretion" and change to the dry Btu method, would be required to go through a new, validly conducted, rulemaking process to develop a new rule—with valid support, if it could find any—to be applied prospectively thereafter.

That result is not indicated herein, however, because the NGPA mandates the *wet* method, as the Court of Appeals properly held; and Petitioners are barred from the claim that the FERC has discretion, as shown earlier in this section. In addition, the NGPA does not give the FERC discretion to make the *type of choice*, with its major consequences involved, which abandonment of the wet method, in favor of the dry method, constitutes. The consequence of such abandonment is, of course, an increase of about 1.7% in the maximum price for all gas sold in the nation, from December 1, 1978 to the present, and on into the future. That is no "technical detail", or formulation of a definition, or a step to "refine definitions", as the FERC Petition claims; it is a substantive policy choice. Adoption of a new, changed method for measurement of the number of Btu's in a given volume of gas is not a definition. Btu is clearly defined, in the NGPA, and is a well known term. The definition of that term is not in issue. Petitioners cite H.R. Conf. Rep. 95-1752, 95th Cong., 2d Sess. (1978), which states that the FERC may "refine definitions of terms provided in the act in a manner that is consistent with the definitions provided." But that same language also appears in Rep. No. 95-496, Part 4, 95th Cong., 1st Sess. 103 (1977), which addressed H.R. 6831 and H.R. 8444, forerunners of the NGPA which has been discussed earlier. And that same Report also provides that the pricing provision of the bill "incorporates Btu adjustments . . . provided for in FPC rate determinations." Thus, it is clear that Congress did not see any need for FERC "refinement" of the term Btu to provide for measurement methodolgy: the bill had already been drafted on the basis that the method previously prescribed by the FERC—the wet method—is to be used.

III. THE COURT OF APPEALS GAVE APPROPRIATE CONSIDERATION AND DEFERENCE TO THE STATUTORY INTERPRETATION OF THE FERC

Both Petitions argue that the Court of Appeals' decision should be reversed because it allegedly failed to give deference to FERC expertise. That argument is in error, both factually and legally. First, the Court of Appeals was well aware of its responsibility to afford due deference to the FERC position. Each of the reasons advanced by the FERC for its change of Btu calculation method was carefully evaluated by the Court of Appeals: that is obvious throughout the opinion, proceeding from the Court of Appeals' statement that:

> In evaluating the petitioners' position, and concomitantly the Commission's (and producer-intervenors') contrary view of the statute, it is our responsibility to measure the parties' arguments in light of the language, legislative history, purpose, and structure of the NGPA, according the Commission the traditional respect due an agency's interpretation of the statute it is called upon to enforce. (716 F.2d at 10).

After concluding its exhaustive analysis of the FERC arguments, the Court of Appeals found:

> Even according the Commission's rationale for the dry rule the respect traditionally due an agency's statutory interpretation, *see, e.g., FEC* v. *Democratic Senatorial Campaign Comm'n*, 454 U.S. 27, 39 (1981); *Batterton* v. *Francis*, 432 U.S. 416, 425 n.9 (1977), we find the Commission's dry rule—whether characterized as legislative or interpretative—to be fundamentally at odds with the Btu measurement technique implicit in the NGPA. (716 F.2d at 15).

It is thus obvious that the Court of Appeals was aware of, and followed, its responsibility of deference to the FERC's decision. But such deference clearly has limits, if the Courts are not to be mere rubber stamps. That principle is established. The FERC decision has failed the test. There has been no failure of proper deference by the

Court of Appeals. Instead, there has been a disregard by the FERC of the purpose and legislative history of the NGPA, as described in detail above.

The applicable principles in these proceedings relative to deference were stated by this Court in an unanimous decision on November 29, 1983, where the Court noted the "considerable deference" due the Federal Labor Relations Authority (FLRA), but reversed the FLRA, and the Court of Appeals' affirmance, stating:

> On the other hand, the 'deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965). Accordingly, while reviewing courts should uphold reasonable and defensible constructions of an agency's enabling Act, *NLRB* v. *Iron Workers, supra*, at 350, they must not 'rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' *NLRB* v. *Brown*, 380 U.S. 278, 291-292 (1965). See *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971. Guided by these principles, we turn to a consideration of the FLRA's construction of § 7131(a). (*Bureau of Alcohol, Tobacco and Firearms* v. *F.L.R.A.*, 52 U.S.L.W. 4013, 4015 (November 29, 1983) (footnote omitted)).

The same principles have been frequently enunciated by this Court in cases not cited in the above case. *Mohasco Corp.* v. *Silver*, 447 U.S. 807 (1980) relevantly notes that a finding that Congress silently changed "carefully prescribed" provisions of the statute was not credible and rejected the agency finding, despite claims of "deference". In *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973), the Court noted that "Courts need not defer to an administrative construction of a statute where there are 'compelling indication that it is wrong.'" See also *Mobil Alaska Pipeline Co.* v. *U.S.*, 436 U.S. 631

(1978); *Adamo Wrecking Co.* v. *U.S.*, 434 U.S. 275 (1978); *Shaw* v. *Vialpando*, 416 U.S. 251 (1974); *SEC* v. *Sloan*, 436 U.S. 103 (1978); *Morton* v. *Ruiz*, 415 U.S. 199 (1974); *Fed. Maritime Comm'n* v. *Seatrain Lines*, 411 U.S. 726 (1973); *Barlow* v. *Collins*, 397 U.S. 159 (1970); *McKart* v. *U.S.*, 395 U.S. 185 (1969); *Volkswagenwerk* v. *FMC*, 390 U.S. 261 (1968); *FTC* v. *Colgate-Palmolive*, 380 U.S. 374 (1965); *American Ship Building* v. *NLRB*, 380 U.S. 300 (1965); *Neuberger* v. *Comm'r of IRS*, 311 U.S. 83 (1940). See also *Texas Gas Transmission Co.* v. *Shell Oil Co.*, 363 U.S. 263 (1960), where this Court also upheld a Court of Appeals' rejection of a FERC *contract* interpretation. Where, as here, the administrative agency's contemporaneous interpretation is later changed by the agency, even less deference is due. *Watt* v. *Alaska*, 451 U.S. 259 (1981); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).[22]

Petitioner Producers, but not Petitioner FERC, even claim that *Public Service Comm'n* v. *Mid-Louisiana Gas Co., et al.*, —— U.S. ——, 51 U.S.L.W. 5030 (June 28, 1983) supports their position, because there the FERC was reversed for failing to follow the NGPA. Here, the producers assert, the FERC did follow the NGPA, but that assumes the answer to the issue in the case. The relevance of Mid-Louisiana is, instead, that there the Court of Appeals reversed the FERC's erroneous interpretation of the NGPA, and was upheld by this Court. The same result is appropriate here.[23]

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[22] The bulk of the cases cited by Petitioners in support of their claim that automatic affirmance of the FERC, through "deference", is warranted, involve affirmance of a *contemporary* agency construction which is also consistent with the Act, neither of which are the case here.

[23] The Court's statement, at 51 U.S.L.W. at 5035, that "Congress would have clearly identified, either in the statutory language or in the legislative history, any significant source of production that was intended to be excluded" is relevant here. There, the FERC ignored that principle, just as in the subject case, the FERC has ignored

[footnote continued on next page]

IV. THERE ARE ADDITIONAL VALID BASES FOR REVERSING THE FERC ORDERS, WHICH THE COURT OF APPEALS WAS NOT REQUIRED TO CONSIDER

If it were to be held that, contrary to Sections I and II, supra, the FERC was empowered by the NGPA to adopt the dry method of Btu measurement, the orders of the Commission which were reversed by the Court of Appeals would still be invalid, on the basis that:

A. The regulation issued on the December 1, 1978 effective date of the NGPA did not mention the dry measurement method, and the notice thereof which had been issued two weeks before, also did not prescribe or mention such method. Further, the next two orders issued—over nineteen months and two years later, respectively—did not amend that regulation. Therefore, there was no valid notice of the allegedly proposed change of method, and thus no opportunity to timely comment thereon, which violates the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.* (which is applicable, *inter alia*, pursuant to Section 502(a) of the NGPA), ruling case law and constitutional due process.

B. As noted above, the FERC obviously articulated no rationale and basis for exercise of discretion to adopt the dry method. Thus, if it were held that the FERC has such discretion, and is not required to adopt a particular method, its orders are nevertheless invalid for failure to articulate and explain the basis for its decision.

> When the Board so exercises the discretion given to it by Congress, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' Phelps Dodge Corp. v Labor Board, 313 US 177, 197, 85 L ed 1271, 1284, 61 S Ct 845, 133 ALR 1217. See Burlington Truck Lines v United States,

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the fact that Congress has given no indication of a change from the wet method of Btu calculation, despite the huge dollar significance which that step would have.

371 US 156, 167-169, 9 L ed 2d 207, 215, 216, 83 S Ct 239; Interstate Commerce Comm'n v J-T Transport Co. 368 US 81, 93, 7 L ed 2d 147, 156, 82 S Ct 204. *NLRB* v. *Metropolitan L. Ins. Co.*, 380 U.S. 438 (1965).

See also, SEC v. *Chenery Corp.*, 332 U.S. 194, 196 (1946).

C. The FERC made its claimed change to the dry method effective December 1, 1978, over three years prior to the issuance of the regulation which provided for such method, and over nineteen months and two years, respectively, before the orders which stated such method should be used (but did not so provide by regulation). Such action violates established principles of law relative to retroactive application of regulations and decisions. Such retroactive application would drastically increase the economic burden to gas consumers, and would cause severe economic loss to pipeline purchasers of gas which are unable to recover retroactive costs from customers served in sales not subject to the jurisdiction of the FERC.

D. The FERC orders did not unequivocally provide that pipelines subject to FERC jurisdiction could recover in their rates, the increased prospective and retroactive costs which would be caused by such orders.

Because the Court of Appeals held that the FERC was prohibited by the NGPA from changing Btu measurement methods, that Court did not reach the above errors of the FERC. A contrary holding by this Court relative to statutory interpretation would, we submit, leave the FERC orders nevertheless invalid, on the above grounds.

V. THERE IS NO CONFLICT OF COURTS OF APPEALS DECISIONS TO BE RESOLVED, AND THERE WILL BE NONE

The questions involved here will not recur. They concern a discrete matter of interpretation of a provision of the NGPA, and the affected parties have appealed the

FERC orders to a single Court of Appeals. There is no conflict of lower court decisions to be resolved here, and none will be created in the future.

VI. THE COURT OF APPEALS' DECISION DOES NOT CAUSE REGULATORY OR ADMINISTRATIVE PROBLEMS OR BURDENS

The Court of Appeals' decision involved here requires the FERC and the natural gas industry to continue to utilize the method of Btu calculation universally used by the FERC and the interstate segment of the industry for many years, as well as by at least a large proportion of the intrastate segment of the industry. Thus, it is obvious that no regulatory or administrative problems or burdens are created for the FERC or the industry.

CONCLUSION

The petitions for writ of certiorari should be denied.

Respectfully submitted,

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THOMAS F. RYAN, JR.
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APPENDICES

APPENDIX A

STATEMENT OF POLICY

26 Fed. Reg. 4614 (1961)

The relevant portions of the FPC's proposed rule in the Statement of Policy read as follows (emphasis added):

§ 2.60 Standards to be considered in determining independent producer's gas to be of "pipeline quality."

(a) "Pipeline quality gas" shall be natural gas which when measured at 14.73 psia at 60 degrees F:

(1) Shall have a heating value of not less than one thousand (1,000) Btu per cubic foot *when saturated with water vapor* (i.e. water saturated gas having a heating value per cubic foot on nine hundred seventy-five (975) Btu to one thousand and twenty-five (1,025) Btu shall be deemed to comply with this requirement), but in no event shall buyer be required to accept natural gas having a heating value of less than nine hundred and fifty (950) Btu per cubic foot, (emphasis added)

• • • •

§ 2.61 Price adjustments for deviations from standards.

(a) Prices per Mcf when measured at 14.65 psia as prescribed by the Commission for the various producing areas shall be reduced for deviations from the standards as follows:

(1) For gas of less than 975 Btu per cubic foot, by an amount equal to

$$\frac{1{,}000\text{—Actual heating value}}{1{,}000} \times \text{area price}$$

APPENDIX B

18 C.F.R. 2.56a(c)(1)

(1) *Btu Adjustment.* (i) For natural gas containing more than 1,000 Btu's per cubic foot, at 60°F. and 14.73 psia, *upward adjustments* shall be made on a *proportional* basis from a base of 1,000 Btu's per cubic foot; and for natural gas containing less than 1,000 Btu's per cubic foot, at 60°F. and 14.73 psia, *downward adjustments* shall be made on a *proportional* basis from a base of 1,000 Btu's per cubic foot. (emphasis added)

* * * *

(iii) The Btu content of the natural gas used in computing this rate adjustment shall be the number of British thermal units (Btu) produced by the combustion, at constant pressure, of the amount of the gas which would occupy a volume of 1.0 cubic foot at a temperature of 60°F. *saturated with water vapor* and under a pressure equivalent to that of 30.00 inches of mercury at 32°F. and under standard gravitational force (980.665 centimeters per second squared) with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of the gas and air and when the water formed by combustion is condensed to the liquid state. (emphasis added)

The above provision pertains to sales from natural gas from wells commenced on or after January 1, 1973, and certain other sales. Identical language to that quoted above is also found in 18 C.F.R. 2.56b(d)(1), which pertains to sales of natural gas from wells commenced prior to January 1, 1973.

LISTING OF AFFILIATES PURSUANT TO RULE 28.1

Listed below, pursuant to Rule 28.1 of the Supreme Court of the United States, are the Respondents, and the Intervenor below, which submit this Brief In Opposition, and the affiliates thereof.

Michigan Wisconsin Pipe Line Company *

American Natural Alaskan Company
American Natural Arctic Company
American Natural Resources Company
American Natural Service Company
ANG Coal Gasification Company
ANR Coal Company
ANR Freight System, Inc.
ANR Gasification Properties Company
ANR Media Company
ANR Storage Company
ANR Western Coal Development Company
ANR Western Storage Company
Associated Central Terminal Company
Associated Trucklines, Inc.
Brooks Run Coal Company
Enterprise Coal Company
Garrett Forwarding Company
Garrett Freightlines, Inc.
Garrett Terminal Corporation
Graves Truck Line, Inc.
Great Lakes Gas Transmission Company
The Luper Transportation Company
New Life Transport Parts Center, Inc.
Road Equipment Financing, Inc.
Road Equipment, Inc.
VICC Land Company
VICCO Coal Company

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* On January 1, 1984, the name of Michigan Wisconsin Pipe Line Company was changed to ANR Pipeline Company.

VICCO International Sales Corporation
VICCO Leasing Company
Virginia Iron, Coal and Coke Company

Northern Natural Gas Company
(a Division of InterNorth, Inc.)

Consolidated Gathering Systems Limited
Consolidated Natural Gas Limited
Consolidated Pipe Lines Company
Consolidex Gas and Oil Limited
Hydrocarbon Transportation, Inc.
I N Holdings, Inc.
Nortex Gas & Oil Company
Northern Arctic Gas Company
Northern Arrow Inc.
Northern Border Pipeline Corporation
(Subsidiary of Northern Plains Natural Co.)
Northern Coal Company
Northern Eagle Inc.
Northern Engineering International Co.
Northern Gas Products Company
Northern Helex Company
Northern Liquid Fuels International Ltd.
Northern Minerals Company
Northern Overthrust Pipeline Company
Northern Petrochemical Company
Northern Plains Natural Gas Company
Northern Propane Gas Company
Northern Trailblazer Pipeline Company
Northern Vocational Training Company
The Protane Corporation
UPG, Inc.

Natural Gas Pipeline Company of America
(a wholly-owned subsidiary of MidCon Corporation)

Exeter Drilling Company
Industrial Fuels Corporation
NAAACO, Inc. (Del.)

NALOCO, Inc. (Del.)
NANBCO Inc.
NAPECO Inc.
NATOCO, Inc.
Natural-Trinidad and Tobago Engineering Company
NGPL-Canyon Compression Co.
NGPL Exploration Company
NGPL Liquids, Inc.
NGPL-Overthrust, Inc.
NGPL Terminal Company
NGPL-Trailblazer, Inc.
NGPL Williston, Inc.
NGPL Offshore Company
MCN Exploration Company
NAERCO, Inc.
NGP-LNG, Inc.
MCN Overseas Inc.
MCN-Trinidad and Tobago LNG Company
MCN Coal Gasification Company
Harper Oil Company
Texoma Production Company
Buckhorn Petroleum Co.
Anthrust, Inc.
MCN Acadian Gas Pipeline Corp.
MCN Bayou Interstate Pipeline Corp.
MCN Calcasieu Gas Gathering Corp.
MCN Equities, Inc.
MCN Louisiana Industrial Gas Supply Corp.
MCN Pelican Interstate Gas Corp.
MCN Pelican Transmission Corp.
MCN Research, Inc.
MCN Spindletop Gas Distribution Corp.
MCN Technologies, Inc.
MCN-TEX Corp.
MCN Transmission, Inc.
MidCon International N.V.
MidCon Hydrocarbons Corp.
MidCon Louisiana Pipeline Corp.
MidCon Mississippi Natural Gas Pipeline Corp.

MidCon Oklahoma Natural Gas Pipeline Corp.
MidCon Texas Pipeline Corp.
MidCon Ventures, Inc.
Mississippi River Transmission Corp.
MCN Transmission, Inc.
Exeter Capital Corporation
Exeter Service Company
TPC Pipeline Company
Exeter Canadian Exploration, Ltd.
Exeter Exploration Company
E. K. Coal Co. Inc.
Empire Coal Company
Fairway Coal Company
Industrial Fuels Equipment Company
Industrial Fuels Leasing Corporation of Ohio
Industrial Fuels Minerals Company
Prater Creek Processing Company
Red Cedar Mining Company, Inc.
Twin Oaks Coal Company
UMET Mining Corporation
Chapperal Coal Corporation
Westcoal Corporation
Wolvering Mining Corporation

Mississippi River Transmission Corporation

(a wholly-owned subsidiary of MCN Transmission Inc., which is a wholly-owned subsidiary of MidCon Corporation).

Transcontinental Gas Pipe Line Corporation

Alapost Corp.
Border Gas, Inc.
C&T Pipeline, Inc.
Dixie Pipeline Company
Gasco Insurance Company, Limited
High Island Offshore System
TCI Realty, Inc.
Towtrans Company
Transco Canada Pipeline Company

Transco Coal Company
Transco Coal Gas Company
Transco Coal Pipeline Company
Transco Development Company
Transco Exploration Company
Transco Finance Company
Transco Gas Clearing House Company
Transco Gas Supply Company
Transco Hydrocarbon Company
Transco International N.V.
Transco LGP Company
Transco-New England Pipeline Company
Transco Offshore Pipeline Company
Transco Peat Methanol Company
Transco Propane Supply Company
Transco Production of Canada Ltd.
Transco Propane Products Company
Transco Synfuels Company
Transco Terminal Company
Transco Tower Realty, Inc.
Trans-Jeff Chemical Corporation
TXP Operating Company
U-T Offshore System
NESP Supply Corp.

Interstate Natural Gas Association of America

The above named association has the following members.

Active Membership

Alabama-Tennessee Natural Gas Company
Algonquin Gas Transmission Company
ANR Pipeline Company
Black Marlin Pipeline Company
Colorado Interstate Gas Company
The Columbia Gas System, Inc.
Consolidated Natural Gas Company
Continental Resources Company
El Paso Natural Gas Company
Granite State Gas Transmission Inc.

Great Lakes Gas Transmission Company
KN Energy, Inc.
Locust Ridge Gas Company
Michigan Gas Storage Company
MidCon Corporation
Mid Louisiana Gas Company
Mitco Pipeline Company
Northern Natural Gas Company
Northwest Energy Company
Pacific Gas Transmission Company
Pacific Interstate Transmission Co.
Panhandle Eastern Corporation
Ringwood Gathering Company
Southern Natural Gas Company
Tennessee Gas Transmission Company
Texas Eastern Transmission Corp.
Texas Gas Resources Corporation
Transco Energy Company
United Gas Pipe Line Company
Valero Interstate Transmission Co.
Valley Gas Transmission, Inc.
Western Transmission Corporation

Associate Members

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ARCO Oil and Gas Company
Arkansas Louisiana Gas Company
Atlanta Gas Light Company
The Brooklyn Union Gas Company
Chevron USA
Conoco Inc.
Enstar Petroleum, Inc.
Entex, Incorporated
Exxon Company, U.S.A.
Forest Oil Corporation
Getty Oil Company
Gulf Oil Exploration and Production Co.
John H. Hill
HNG Fossil Fuels Company

HNG Oil Company
Kinsey Interests
Laclede Gas Company
Lear Petroleum Exploration, Inc.
LGPC Exploration, Inc.
Marathon Oil Company
Minerals, Inc.
Mitchell Energy & Development Corp.
Mobil Oil Corporation
National Fuel Gas Company
Natural Resources Corporation
Phillips Petroleum Company
Shell Oil Company
Southern California Gas Company
Southern Union Company
Sun Gas Company
Union Oil Co. of California

Office - Supreme Court, U.S
FILED
FEB 16 1984
ALEXANDER L. STEVAS
CLERK

Nos. 83-1171 and 83-1173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL ENERGY REGULATORY COMMISSION,
EXXON CORPORATION, *et al.*,
Petitioners,

v.

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT ASSOCIATED GAS DISTRIBUTORS

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QUESTION PRESENTED

The Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. §§ 3301 *et seq.*, establishes maximum lawful prices, based upon energy content, for natural gas sales. The Federal Energy Regulatory Commission was authorized to raise these prices only in certain, very limited, circumstances. Commission Order Nos. 93 and 93-A changed a widely accepted and consistently implemented methodology for determining the energy content of natural gas for ceiling price purposes. The effect of this change was to raise congressionally mandated ceiling prices by approximately 1.74 percent. The question presented for review is whether the court of appeals was correct in finding this price increase to be fundamentally at odds with the NGPA and its legislative history.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-1171 and 83-1173

FEDERAL ENERGY REGULATORY COMMISSION,
EXXON CORPORATION, *et al.*,
Petitioners,

v.

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT ASSOCIATED GAS DISTRIBUTORS

Associated Gas Distributors (AGD)[1] hereby responds in opposition to the petition of Exxon Corporation, *et al.* (Producers) and the Federal Energy Regulatory Commission (Commission or FERC) for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

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[1] AGD was a petitioner and intervenor in the proceedings below. It is an informal association of some forty local gas distribution utilities that sell and distribute approximately 25 percent of the natural gas sold in the interstate market. Its members purchase most of their supplies of natural gas from interstate pipeline companies which, in turn, purchase most of their supplies from producers. The prices paid by interstate pipelines for gas supplies are flowed through to the pipelines' distributor-customers under FERC-approved purchased gas adjustment (PGA) procedures. Pursuant to Sup. Ct. R. 28.1, a list of AGD member companies and their affiliates is attached as an Appendix hereto.

STATEMENT OF THE CASE

1. Prior to the passage of the Natural Gas Policy Act of 1978 (NGPA), the Federal Power Commission (FPC) and later FERC established maximum wellhead prices for natural gas sales pursuant to the "just and reasonable" standard of section 4 of the Natural Gas Act (NGA), 15 U.S.C. § 717c (1982). Because gas is sold on a volumetric basis, ceiling prices were expressed in terms of cents per thousand cubic feet (Mcf's). Prices per Mcf were then adjusted to "reflect the energy content of the gas, which in reality is what the consumer is purchasing." FPC Opinion No. 468, 34 F.P.C. 159, 223 (1965).

2. The energy content of natural gas is measured in terms of British thermal units (Btu's). The presence or absence of combustible substances (such as propane, butane and ethane) and non-combustible substances (such as carbon dioxide, helium and nitrogen) can affect the Btu content of a given volume of natural gas by 50 percent or more. The presence or absence of water vapor will also slightly affect the energy content of the gas.[2]

Under the NGA, Btu content was measured for pricing purposes under specified, standard conditions of temperature, pressure, and water vapor content. Although varying amounts of water vapor can affect the energy value of a gas sample, "the Commission sought to factor out this relatively small variable—to ensure ease of measurement and consistency among samples." 716 F.2d at 4.[3] This standard Btu measurement practice became known as the "wet" method.

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[2] Under typical delivery conditions, fluctuations in water vapor content will affect Btu value by no more than 0.15 percent. Order No. 93-A, reproduced in Appendix B to the FERC Petition, at App. 78a and n.2. Hereafter, all Appendix citations will be to the Commission's Appendices.

[3] The court of appeals' decision is reported in *Interstate Natural Gas Ass'n* v. *FERC*, 716 F.2d 1 (D.C. Cir. 1983).

The wet rule enjoyed widespread industry acceptance and consistent FPC implementation for over fifteen years. Originally proposed in 1961, the rule was expressly sanctioned by the Commission in 1965, and was adopted in both area and national rate proceedings under the NGA. 716 F.2d at 5. Indeed, in its first national rate proceeding, the Commission specifically rejected an argument by natural gas producers that Btu content should be redefined in terms of "dry" or "as delivered" conditions. FPC Opinion No. 699-H, 52 F.P.C. 1604, 1630 (1974).

3. In November of 1978, Congress enacted the NGPA, which substituted congressionally mandated ceiling prices for the maximum rates established by the Commission. The NGPA's ceiling prices were stated in terms of Btu's, rather than in terms of Btu-adjusted Mcf's as had been the practice under the NGA. In a number of cases, however, Congress carried over NGA rates directly into the NGPA. NGPA §§ 104, 106(a), 109(b), 15 U.S.C. §§ 3314, 3316(a), 3319(b) (1982). This was possible because unadjusted base rates under the NGA were established for natural gas with an energy value of one million Btu's, or one MMBtu, per Mcf (wet measure). *See, e.g.*, FPC Opinion No. 770, 56 F.P.C. 509, 602 (1976).

4. On November 15, 1978, the Commission proposed, and on December 1, 1978 the Commission adopted, an interim Btu measurement rule for the NGPA. The new rule was virtually identical to its NGA predecessor, and nothing in the preamble to the rule indicated that the Commission intended to depart from its well-established practice. 43 Fed. Reg. at 53,333 and 53,280 (1978), *quoted in* 716 F.2d at 6.

Eighteen months later, on July 16, 1980, the Commission issued Order No. 93, which "adopted" the interim rule as the final rule, changing only its format. 18 C.F.R. § 270.204, reproduced at App. 50a. The preamble to Order

No. 93, however, stated that measurements obtained under standard conditions would have to be "converted" to reflect "dry" or "as delivered" energy content. Order No. 93 at App. 43a. Only a single sentence of explanation was offered for this dramatic reversal. *Id.*

In Order No. 93-A, issued on April 24, 1981, the Commission reaffirmed both section 270.204 and the new dry measurement policy. Dry measurement, the Commission asserted, was necessary to establish precise Btu correlations between natural gas and other fuels. Order No. 93-A at App. 63a. Finally, on December 24, 1981, the Commission changed the text of section 270.204, incorporating the new "dry" or "as delivered" policy into the regulation itself. Order Vacating Partial Stay and Amending Regulations at App. 90a-92a. Because the Commission considered each of its orders to be a "clarification" of the interim rule, the Order No. 93 rule was made retroactive to December 1, 1978. App. 73a and 91a.[4]

5. The court of appeals reached a unanimous decision that the Commission's Btu measurement rule must be vacated. The court held that not only did the NGPA not require a change to the dry measurement rule from long industry and Commission practice, the NGPA did not even permit such a departure. Upon consideration of four petitions for rehearing, the panel, again unanimously, denied them. Finally, upon consideration of four suggestions for rehearing *en banc*, the full court sitting *en banc* denied the suggestions because no member of the court requested the taking of a vote thereon.

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[4] AGD and other parties below challenged the Commission's lack of effective notice and its retroactive application of the rule to more than three years of natural gas sales. The court of appeals found it unnecessary to reach these issues because it vacated the rule in its entirety on the ground that it was inconsistent with the NGPA. 716 F.2d at 4, 9, 10, 15. Of course, if that decision were reversed, the procedural issues would remain to be adjudicated.

SUMMARY OF REASONS FOR DENYING THE PETITION

The petitions for a writ of certiorari should be denied because the decision below was correct. The court of appeals accorded the dry measurement rule the deference properly due an agency's non-contemporaneous statutory interpretation. The court found the rule unreasonable because it displaced the only measurement technique of which Congress could have been aware and contradicted Congress's intent to carry over NGA price ceilings for certain categories of natural gas. Under such circumstances, the court of appeals had no choice but to vacate the rule.

REASONS FOR DENYING THE PETITION

A. Judicial Deference To The Commission's Erroneous Statutory Interpretation Is Not Appropriate.

Despite overwhelming evidence that Congress intended to carry over wet measurement techniques to the NGPA, Petitioners maintain that the court of appeals should have deferred to the contrary judgment of the Commission. FERC Petition at 12-13; Producers Petition at 19-20. As this Court has repeatedly recognized, however, the courts are the final authorities on issues of statutory construction and "are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *SEC* v. *Sloan*, 436 U.S. 103, 118 (1978) (quoting *NLRB* v. *Brown*, 380 U.S. 278, 291 (1965) and *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 272 (1968)). This is precisely the outcome that the court of appeals sought to avoid in this case:

> Thus, however more appealing the dry rule may be to the Commission's sense of scientific aesthetics and accuracy, it is not for the Commission to "improve" the statutory design chosen by Congress.

716 F.2d at 15.

1. The Commission conceded below that the dry rule was a mere interpretation of congressional intent, and was not intended to be "legislative" in effect. Court of Appeals Brief for Respondent FERC at 24-25, 28 n.28; 716 F.2d at 9, 15. An interpretive rule may be upheld only if it is a "reasonable and defensible" interpretation of the statute at issue. *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 52 U.S.L.W. 4013, 4015 (U.S. Nov. 29, 1983). Among the factors to be considered in determining whether an interpretive rule is reasonable are:

> . . . the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Adamo Wrecking Co. v. *United States*, 434 U.S. 275, 287 n.5 (1978) (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)). Deference to such rules is appropriate only where "an agency has rendered binding, consistent, official interpretations of its statute over a long period of time." *Piper* v. *Chris-Craft Industries*, 430 U.S. 1, 41 n.27 (1977). A non-contemporaneous interpretation that contradicts an agency's earlier position "does not fare well under these standards." *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141-42 (1976); *see also Consumer Product Safety Comm'n* v. *GTE Sylvania*, 447 U.S. 102, 120 & n.17 (1980).

2. Order Nos. 93 and 93-A did not reflect a long-standing and consistent interpretation of the NGPA. Nor did they represent a contemporaneous interpretation of that statute. Rather, they represented a dramatic change from fifteen years of consistent Commission practice that was first announced two years after the NGPA was enacted. The Commission's initial Btu measurement rule, issued contemporaneously with the statute, was virtually identical to the established wet rule.[5] 716 F.2d

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[5] Indeed, a number of producers interpreted the interim rule as a wet rule, and challenged it on that basis. 716 F.2d at 7-8. The

at 6. Order No. 93, issued a year and a half later, stated for the first time that Btu values obtained under the Commission's wet rule would have to be "converted" to dry values. Only a single sentence of support was offered for this dramatic reversal. Order No. 93 at App. 43a. Thus, the Commission's new dry rule was adopted in a hesitating, inconclusive manner, and was first explained to the public in Order No. 93-A, issued on April 24, 1981, two and a half years after the NGPA was enacted. As the dry rule was promulgated "by implication" (at best) in 1978, it may not be construed as "contemporaneous construction" of the NGPA, and is not entitled to great judicial deference. *Adamo Wrecking Co.*, 434 U.S. at 287 n.5.

3. Petitioners assert that the dry rule was promulgated pursuant to the Commission's authority under NGPA section 501(b), 15 U.S.C. § 3411(b) (1982), to define technical and accounting terms. FERC Petition at 18-19; Producers Petition at 22-25. Thus, they argue that the rule was left to "the ultimate discretion of the Commission" (FERC Petition at 18) and the court of appeals "usurped an administrative function" when it found the Commission's rule to be in conflict with the statute. Producers Petition at 25.

This is a distortion of the applicable standard of review. First, section 501(b) was not invoked in Order Nos. 93 or 93-A, or in any of the briefs in the court of appeals.[6] To the contrary, the Commission asserted below *only* that the NGPA *required* dry measurement, not that the NGPA left the question to FERC's discretion. Indeed, the Commission argued that it "was given no independent authority under the NGPA to de-

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Commission itself has gone as far as to admit that this rule was "vague" and "ambiguous". Order No. 93-A at App. 72a, 73a.

[6] The Commission may not now raise an argument that did not form part of the articulated basis of its rule, *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943), and that was not even raised before the court of appeals. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

fine 'Btu'." Brief for Respondent FERC at 28 n.28, *quoted in* 716 F.2d at 15.[7] The dry rule was a mere interpretation of congressional intent, the Commission argued, and could therefore be applied retroactively and without notice and an opportunity for comment. FERC Brief at 24-25, 28-29. If it were now determined that the dry rule was a definition committed to the FERC's discretion under section 501(b), the rule would have to be vacated for failure to comply with the requirements of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (1982).

Second, the Petitioners' new contention that the NGPA vested in FERC the *discretion* to impose a dry measurement rule *or not* is utterly inconsistent with the legislative history, which demonstrates that Congress prescribed exact ceiling prices (in dollars), and the unit to which they should be applied (Btu's), based on careful consideration of their relationship to oil prices and their impact on producers and consumers. It is simply not plausible that Congress left to FERC the discretion to alter that price impact by a factor of 1.74 percent if it wished.[8]

Finally, even if the Commission were allowed to reverse ground and base its decision on section 501, that section would not support the orders at issue here. Section 501 specifically states that the Commission may define technical and accounting terms in a manner *con-*

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[7] Producers thus err when they assert that it was the court of appeals' "conclusion" that FERC lacked independent authority to define "Btu" (Producers Petition at 22) and that the court of appeals "provides no basis for its decision to interfere in the Commission's exercise of its [section 501] authority." *Id.* at 24.

[8] If FERC had discretion at all, it would have been to (1) convert to dry measurement and (2) make a compensating 1.74 percent reduction in the NGPA ceiling prices, so as not to tamper with the actual price impact established by Congress. The Commission expressly rejected that approach. Order No. 93-A at App. 65a-69a.

sistent with the Act itself. Indeed, it is a general rule of administrative law that "[i]n order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose." *Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974). Yet, as the court of appeals found, the Commission's dry rule was "inconsistent with the NGPA's language, structure, and legislative history," and "fundamentally at odds with the Btu measurement technique" implicit in the Act. 716 F.2d at 14, 15.[9]

B. The Commission's Rule Was Inconsistent With The NGPA And Its Legislative History.

The court of appeals correctly found that, in enacting the NGPA, Congress intended to set ceiling prices on the basis of the well-established "wet" method of measuring Btu's. The court gave three reasons for this conclusion. First, when Congress enacted the NGPA, it directly incorporated NGA ceiling prices for certain categories of natural gas. This interchangeability of NGA ceiling prices and NGPA ceiling prices is *only* possible if the *same* Btu measurement technique is used in both cases. Second, the wet method was the only method of Btu measurement with which Congress was, or could have been, familiar. Finally, Congress specifically rejected

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[9] The Commission contends that:

> Absent a finding that the Commission's action in issuing the Btu Rule was arbitrary, capricious, or an abuse of discretion—a finding that the court of appeals did not even attempt to make—the court was without authority to overturn the Commission's rule.

FERC Petition at 19. Section 706 of the APA, to which the Commission apparently alludes, provides that the reviewing court shall set aside agency conclusions that are "arbitrary, capricious, an abuse of discretion, *or otherwise not in accordance with law*." 5 U.S.C. § 706(2)(A) (1982) (emphasis added). Although interpretive rules are ordinarily accorded a less deferential standard of review, *Batterton* v. *Francis*, 432 U.S. 416, 425 n.9 (1977), the court of appeals *did* find that the Commission's position was "not in accordance with law." 716 F.2d at 15.

the "hyper-accurate" inter-fuel comparisons propounded by FERC and the Producers as a basis for natural gas pricing. In all three respects, the court was correct.

1. When Congress enacted the NGPA, it directly incorporated NGA maximum price levels for certain categories of gas. This carryover of NGA pricing, the court of appeals found, indicated a congressional intent to carry over the established wet measurement techniques underlying NGA pricing. 716 F.2d at 13.

Petitioners object to this finding. NGA ceiling prices were set in terms of cents per Mcf, they assert, while NGPA ceilings are set in terms of cents per MMBtu.[10] FERC Petition at 16-17; Producers Petition at 21. No direct correlation exists between the two pricing systems, they contend. Order No. 93-A at App. 60a.

The Commission's position on this issue is demonstrably incorrect. First, NGA price ceilings were adjusted to reflect directly the Btu content of natural gas. Second, unadjusted NGA price ceilings are directly convertible from Mcf's to MMBtu's only if the same Btu measurement technique is used in both cases. Thus, there *is* a direct correlation between the Mcf pricing of the NGA and the Btu pricing of the NGPA, and this correlation *requires* the carryover of wet Btu measurement into the NGPA pricing scheme.

First, adjusted NGA price ceilings directly reflect the Btu content of natural gas sold. Although NGA ceiling prices were set on an Mcf basis, these prices were adjusted to reflect Btu content. The purpose of these Btu adjustments was to allow gas prices to "reflect the energy content of the gas, which in reality is what the consumer is purchasing." FPC Opinion No. 468, 34 F.P.C.

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[10] The Commission implies that NGA ceiling rates were set only "within broad ranges". FERC Petition at 11. That is not correct. Like NGPA maximum prices, NGA just and reasonable rates were prescribed in the form of exact ceilings. *See, e.g.*, 716 F.2d at 13.

159, 223 (1965); FPC Opinion No. 662, 50 F.P.C. 390, 399 n.18 (1973).[11] This was also their effect: a higher Btu content meant a higher price for a given volume of natural gas. Furthermore, Btu adjustments were always made "on a proportional basis." *See, e.g.*, FPC Opinion No. 770, 56 F.P.C. at 602. Thus, a ten percent increase in Btu content meant a ten percent increase in the price per Mcf, while a five percent reduction in Btu content meant a five percent reduction in the Mcf price. FPC Opinion No. 468, 34 F.P.C. at 223 n.46.[12] The result was that the price for a given number of Btu's was constant regardless of the volume of gas in which those Btu's were actually delivered.

Second, unadjusted NGA price ceilings are directly convertible from Mcf's to MMBtu's as long as the same Btu measurement technique is used in both cases. Unadjusted NGA price ceilings were established for natural gas with an energy value of one million Btu's, or one MMBtu, per Mcf. *See, e.g.*, FPC Opinion No. 770, 56 F.P.C. at 602. Thus, Congress was able to carry over price ceilings from the NGA to the NGPA simply by substituting "MMBtu" for "Mcf" and eliminating the

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[11] The Commission asserts that these Btu adjustments were intended only for "quality control," and not as part of a pricing mechanism. FERC Petition at 17. Yet, as FERC admits, their purpose was to provide "some incentive to maximize the Btu content of interstate gas." *Id.* In short, the Btu adjustments operated to reward higher Btu's with a proportionately higher price. That is exactly the same as the operation of MMBtu pricing under the NGPA.

[12] Petitioners note that many early area rates provided no Btu adjustment for gas with a Btu content of between 1000 and 1050 Btu's per Mcf. FERC Petition at 4 n.4; Producers Petition at 4 n.6. In the early 1970's, various natural gas producers attacked this "Btu gap" as "illogical and not based on evidentiary support." The Commission agreed, and eliminated the gap. FPC Opinion No. 662, 50 F.P.C. at 399.

Btu adjustment.[13] This intended correlation is possible, however, *only* if the *same* Btu measurement technique is used under the NGPA as under the NGA.[14]

The one MMBtu per Mcf equivalency of unadjusted NGA price ceilings is based on wet measurement techniques. *See, e.g.*, FPC Opinion No. 770, 56 F.P.C. at 602. When FERC substituted dry measurement techniques under the NGPA, it destroyed the direct equivalency intended by Congress, raising prices by 1.74 percent. As the court of appeals noted,

> Congress did not intend for the Commission to raise the effective wellhead price of gas as much as possible. Rather, Congress itself specified the maximum lawful prices of most categories of gas and author-

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[13] For two pricing categories, Congress adopted the maximum price levels set by the FPC under the NGA, changed the denominator from Mcf's to MMBtu's, and applied an inflation adjustment. NGPA §§ 106(a), 109(b), 15 U.S.C. §§ 3316(a), 3319(b) (1982). *See* 716 F.2d at 13. For a third category, Congress mandated that the NGPA price ceiling for section 104 gas would be the "just and reasonable" NGA rate for such gas as of April 20, 1977. 15 U.S.C. § 3314 (1982). The specified NGA rate was $1.45 per Mcf, and the Commission imposed an NGPA price of $1.45 per MMBtu. Order No. 93-A at App. 65a-69a. Congress intended to achieve the same effect in incorporating NGA prices by reference as it had achieved by carrying over specific dollar values. Order No. 93-A at App. 57a n.9, 66a.

[14] The Commission's Order No. 93-A calculation, which purports to show the contrary, is demonstrably incorrect. Order No. 93-A at App. 84a-85a. The Commission assumes (1) a cash flow of $1 million; (2) an energy value of one MMBtu per Mcf (*dry* measure); and (3) delivered volume of one million Mcf of natural gas. The Commission then proceeds to argue that dry measurement techniques would be required to produce an NGPA price of $1.00/MMBtu. The *NGA* price would be $1.00/Mcf, however, only if dry measurement were used under that statute. As NGA pricing was premised upon *wet* measurement, assumption (2) above yields an NGA energy value of less than one MMBtu per Mcf, requiring a downward price adjustment under that statute, and rendering the Commission's price and cash flow assumptions inconsistent.

ized the Commission to raise those prices only in certain, very limited, circumstances.

716 F.2d at 15. Thus, the congressional intent to carry over NGA just and reasonable rates for certain categories of natural gas *requires* the carryover of wet measurement techniques applied under the NGA.[15]

2. Moreover, the wet method was the only Btu measurement technique of which Congress was aware at the time the NGPA was enacted. At that time, the Btu content of natural gas had been defined by the Commission in terms of a standardized, saturated condition for over fifteen years.[16] 716 F.2d at 12. The wet rule, the court found, was the only method of measuring Btu's that was even tangentially acknowledged in the NGPA's history. *Id.* Thus, both the NGPA and its legislative history are replete with references to the "just and reasonable" rates established under the NGA. *See, e.g.*, NGPA §§ 104, 106(a), 15 U.S.C. §§ 3314, 3316(a)

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[15] The Commission asserts that the court of appeals failed to explain how this implicit codification of the wet method can apply to those pricing provisions that make no reference to NGA just and reasonable rates. FERC Petition at 15. As the Commission itself explained in Order No. 93-A, however, "identical provisions in a statute" should be interpreted consistently where there is no "compelling reason to do otherwise." Order No. 93-A at App. 64a.

[16] Wet measurement of Btu content had been used to apply Btu adjustments in every area rate and national rate proceeding under the Natural Gas Act beginning in 1965. *See, e.g.*, FPC Opinion No. 468, 34 F.P.C. 159, 224 (1965) (first area rate case) (incorporating wet measurement standard of Opinion No. 464, 33 F.P.C. 1228, 1238 (1965)); FPC Opinion No. 699-H, 52 F.P.C. 1604, 1630 (1974) (first national rate case). Indeed, in 1974 the Commission specifically considered and rejected the producers' arguments that the Btu content of gas should be "adjusted for the water vapor content in the gas as it is delivered." FPC Opinion No. 699-H, 52 F.P.C. at 1630.

(1982). These NGA rates included Btu adjustments based on standard wet measurement techniques.[17]

Furthermore, there is no evidence of any contrary legislative intent. As a general rule, "an important and controversial change in existing law" should not be inferred from congressional silence. *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979). *Cf. Columbia Gas Development Corp.* v. *FERC*, 651 F.2d 1146, 1158 (5th Cir. 1981) (in replacing NGA price ceilings, Congress did not intend to replace other price-related procedural provisions of that Act). Thus, the court of appeals concluded, "the Commission's attribution to Congress of a price component with which it was wholly unfamiliar is unreasonable." 716 F.2d at 13.[18]

In the face of more than fifteen years of consistent practice by FERC and the Federal Power Commission, Petitioners claim that certain unregulated, pre-NGPA

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[17] As the House committee report accompanying one of the NGPA's forerunner bills acknowledged,

> The reference to FPC-determined just and reasonable prices and contract prices for purposes of determining maximum lawful prices under section 405 incorporates Btu adjustments and other quality adjustments provided for in FPC rate determinations or in the applicable contract.

H.R. Rep. No. 496, Part 4, 95th Cong., 1st Sess. 103 (1977), 1978 U.S. Code Cong. & Ad. News 8454, 8547. Although the final version of the NGPA differed in many respects from this bill, the concept of carrying over just and reasonable rates remained. 716 F.2d at 12.

[18] Petitioners cite this Court's opinion in *Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 51 U.S.L.W. 5030 (U.S. June 28, 1983), for the novel proposition that in the absence of express direction of Congress, all pre-NGPA practices should be deemed repealed. Producers Petition at 14-16. *Mid-Louisiana* in fact holds that, given the comprehensive nature of the NGPA, no *source of production* should be excluded from its coverage unless clearly identified in either the statute or its legislative history. 51 U.S.L.W. at 5035.

contracts for intrastate sales of natural gas included "dry" Btu measurement provisions. These provisions, Petitioners suggest, "might" have been what Congress had in mind when it enacted the NGPA. FERC Petition at 14-15, 17-18; Producers Petition at 20-21.[19] This is sheer speculation. Petitioners cite absolutely no support for *either* (a) the assertion that intrastate contracts traditionally employed dry measurement *or* (b) the assertion that Congress was familiar with such contracts. The Commission did not rely upon, or even mention, "dry measurement" provisions of intrastate contracts in Order Nos. 93 or 93-A, and neither FERC nor the Producers raised this issue before the court of appeals. Thus, even if these hypothetical contractual provisions existed, they were not a part of the articulated basis of Order Nos. 93 and 93-A, and could not be used to bolster those orders on review. As this Court stated in *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943), "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."

3. Finally, the hyper-accurate inter-fuel comparisons underlying the Commission's dry rule were rejected by Congress. In Order No. 93-A, the Commission articulated only one reason for abandoning the wet measurement rule. Congress had established natural gas prices

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[19] Petitioners further argue that conversion of these intrastate contracts to wet measurement will somehow force intrastate sellers to receive less than the maximum prices prescribed by their contracts, a result that "Congress clearly did not contemplate." FERC Petition at 18. On the contrary, in section 105(b)(2) of the NGPA, 15 U.S.C. § 3315(b)(2) (1982), Congress specifically addressed the problem of existing intrastate contract prices exceeding the ceiling prices imposed by the Act. If, in fact, there were intrastate contracts that applied dry measurement techniques in such a manner as to exceed NGPA ceiling prices—a speculation for which there is no evidence in the record—the rates prescribed in these contracts should have been set in accordance with this section.

by reference to the prices of alternative fuels, the Commission argued, and "true comparison" of fuel energy values "can only be achieved" with dry measurement techniques. Order No. 93-A at App. 63a. Producers repeat this argument at length, citing provisions from early House and Senate versions of the NGPA, as well as Dr. Schlesinger's testimony on the original administration proposal.[20] Producers Petition at 17-18.

As the court of appeals observed, however, Congress abandoned inter-fuel price-indexing in the final version of the NGPA. 716 F.2d at 14. Neither the "current Btu equivalent price" provisions cited by the Producers, nor the parallel provisions in the proposal to which Dr. Schlesinger referred, ever became law. Moreover, Congress demonstrated its acceptance of commonly accepted "standard assumptions" about the energy content of various fuels in other statutory provisions enacted contemporaneously with the NGPA. 716 F.2d at 14.[21] Thus, although Congress considered the value of alternative energy sources in establishing NGPA ceilings, it specifically rejected the hyper-accurate inter-fuel comparisons that Petitioners now propound.

Finally, the Petitioners' emphasis on the need for "accurate" and "precise" Btu measurement is extremely misleading. *See, e.g.*, FERC Petition at 10; Producers Petition at 10. Under the dry rule, as under the wet

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[20] This proposal included *Mcf* pricing for natural gas. *See* S. 1469, 95th Cong. 1st Sess. § 406(b) (1977).

[21] Indeed, the Commission itself has endorsed the use of standard assumptions about inter-fuel Btu comparisons in its implementation of the *one* NGPA provision that *does* retain such comparisons. NGPA section 204(e), 15 U.S.C. § 3344(e) (1982), requires that the Commission determine the cost of alternative fuels on an MMBtu basis. Yet, in its implementing regulations, the Commission adopted a standard conversion factor, specifically rejecting suggestions that costs be adjusted to accommodate variations in Btu content among differing qualities of oil. 716 F.2d at 14.

rule, only the Btu content of a tiny sample of gas is actually measured. Since passage of the NGPA, natural gas continues to be sold on a volumetric basis. Order No. 93-A at App. 82a. The total number of Btu's sold is computed by multiplying the Btu content of the sample by the volume of gas delivered. Producers' Petition at 9; Order No. 93-A at App. 53a n.5. Similarly, the "conversion" process required by the dry rule was simply that of a mathematical computation. Order No. 93 at App. 43a; Order No. 93-A at App. 71a.

Moreover, contrary to its purported preoccupation with the need for "precise" Btu measurement, the Commission has been extremely relaxed about the measurement techniques actually applied. The Commission has stated that it will accept "any estimation method reasonably designed to measure Btu content" (Order No. 93 at App. 43a), any measurement instrument agreed upon by the parties (App. 44a), and any measurement procedure and measurement frequency accepted in the industry. Order No. 93-A at App. 52a, 71a. In reality, then, the dry rule would yield *no* additional accuracy, *only* a 1.74 percent increase in the price ceilings mandated by Congress.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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February 16, 1984

APPENDIX

APPENDIX

ASSOCIATED GAS DISTRIBUTORS

Baltimore Gas & Electric Company

Affiliate:

Safe Harbor Water Power Corporation

Bay State Gas Company

Subsidiaries:

Bay State Exploration, Inc.
Northern Utilities

Subsidiary: Granite State Gas Transmission Co.

The Berkshire Gas Co.

Boston Gas Co.

Parent:

Eastern Gas and Fuel Associates

The Brooklyn Union Gas Co.

Subsidiaries:

Fuel Resources, Inc.
Gas Energy, Inc.

Affiliate:

Honeoye Storage Corp.

Central Hudson Gas & Electric Corp.

Subsidiaries:

Cruger Development Corp.
Greene Point Development Corp.
Phoenix Development Co., Inc.

Chesapeake Utilities Corp.

Subsidiaries:

Eastern Shore Natural Gas Co.
Dover Exploration Company
Skipjack, Inc.

City of Holyoke, Mass., Gas & Electric Dept.

City of Westfield Gas & Electric Light Dept.

Colonial Gas Co.

Subsidiary:

Trans Gas, Inc.

Commonwealth Gas Co.

Parent:

Commonwealth Energy System

Concord Natural Gas Corp.

Subsidiary:

Concord Gas Service Corp.

Consolidated Edison Company of New York, Inc.

Delmarva Power & Light Co.

Subsidiary:

Delmarva Energy Co.

Elizabethtown Gas Co.

Parent:

National Utilities & Industries Corporation

EnergyNorth, Inc.

Subsidiaries:

Manchester Gas Co.
Gas Service, Inc.

Essex County Gas Co.

Fitchburg Gas & Electric Light Co.

Subsidiary:

Fitchburg Energy Devel. Co.

Long Island Lighting Co.

Lynchburg Gas Co.

Subsidiary:

Lynco Development Co.

New Jersey Natural Gas Co.

Subsidiaries:

Gas Associated Services, Inc.
New Jersey Natural Gas Resources Co.

New York State Electric & Gas Corp.

Northeast Georgia Municipal Gas Utilities

City of Bowman, Ga.
City of Buford, Ga.
City of Commerce, Ga.
City of Covington, Ga.
City of Elberton, Gas.
City of Hartwell, Ga.
City of Lawrenceville, Ga.
City of Madison, Ga.
City of Monroe, Ga.
City of Royston, Ga.
City of Social Circle, Ga.
City of Sugar Hill, Ga.
City of Taccoa, Ga.
City of Union Point, Ga.
City of Winder, Ga.

Northeast Uitlities, Inc.

Companies Controlled:

The Connecticut Light & Power Co.
Western Massachusetts Electric Co.
Holyoke Water Power Co.
Northeast Nuclear Energy Co.
The Quinnehtuk Co.
The Rocky River Realty Co.
Northeast Utilities Service Co.

Northern Utilities, Inc.

See: Bay State Gas Co.

Pennsylvania Gas & Water Company

Parent:

Pennsylvania Enterprises, Inc.

Pennsylvania & Southern Gas Co.

Pequot Gas Co.

Philadelphia Electric Co.

Subsidiaries:

Conowingo Power Co.
Eastern Pennsylvania Development Co.

Subsidiaries:

Adwin Equipment Co.
Adwin Realty Co.

Eastern Pennsylvania Exploration Co.

Philadelphia Electric Power Co.

Subsidiary:

The Susquehanna Power Co.

The Susquehanna Electric Co.

Philadelphia Gas Works

Providence Gas Co.

Parent:

Providence Energy Corporation

Public Service Company of North Carolina, Inc.

Subsidiary:

Tar Heel Energy Corp.

Public Service Electric & Gas Co.

Subsidiaries:

Energy Development Corp.
Energy Pipeline Corp.
Energy Terminal Services Corp.
PSESG Research Corp.

South County Gas Co.

South Jersey Gas Co.

Parent:

South Jersey Industries, Inc.

The Southern Connecticut Gas Co.

Parent:

Connecticut Energy Corp.

Subsidiaries:

Gas Storage, Inc.
Onset Marketing Corp.

UGI Corporation

Subsidiaries:

AmeriGas, Inc.
UGI Development Co.

Valley Gas Co.

Parent:

Valley Resources, Inc.

Washington Gas Light Co.

Subsidiaries:

Brandywood Estates, Inc.
Crab Run Gas Co.
Davenport Insulation, Inc.
Frederick Gas Co., Inc.
Hampshire Gas Co.
Shenandoah Gas Co.
Washington Gas Approved Services, Inc.

Office - Supreme Court, U.S.
FILED
FEB 16 1984
P. L. STEVAS,
CLERK

Nos. 83-1171 and 83-1173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EXXON CORPORATION, et al.,
Petitioners,

vs.

INTERSTATE NATURAL GAS ASSOCIATION
OF AMERICA, et al.,
Respondents.

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

INTERSTATE NATURAL GAS ASSOCIATION
OF AMERICA, et al.,
Respondents.

On Petitions For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF FOR LACLEDE GAS COMPANY IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301. *et seq.*, did not allow the Federal Energy Regulatory Commission to raise the wellhead price of natural gas above Congressionally established maximum ceiling prices by adopting a standard for the measurement of Btu content which was different from the one in effect when Congress passed the NGPA.

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Nos. 83-1171 and 83-1173

IN THE

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On Petitions For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF FOR LACLEDE GAS COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a)[1] is reported at 716 F.2d 1. The orders of the Federal Energy Regulatory Commission (Pet. App. 32a-5a, 51a-86a, 87a-92a) are published at 45 Fed. Reg. 49077, 46 Fed. Reg. 24537, and 47 Fed. Reg. 614, respectively.

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[1] "Pet. App." references are to the appendices to the Petition in No. 1173.

JURISDICTION

The judgment of the court of appeals (Pet. App. 93a-98a) was entered on August 9, 1983. Petitions for rehearing were denied on October 19, 1983 (Pet. App., 99a-100a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 15 U.S.C. 3416(a)(4).

STATUTE AND REGULATION INVOLVED

The relevant statutes include the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (Supp V 1981); the Natural Gas Act, 15 U.S.C. §§ 717a-717r; and the Administrative Procedure Act, 5 U.S.C. §§ 551-559. In addition to the statutes and regulations set out in Pet. App. G, we have set forth in the Appendix, infra, Section 502(a) and 502(b) of the Natural Gas Policy Act, and the Administrative Procedure Act, 5 U.S.C. § 553(b)(3) and § 553(c).

STATEMENT

The orders of the Federal Energy Regulatory Commission[2] vacated by the court below promulgated the so-called "Btu measurement rule," 18 C.F.R. § 270.204, which prescribes the manner in which the energy content of a given volume of natural gas, measured in British thermal units ("Btu's"), is to be determined for purposes of applying maximum ceiling prices under the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301-3432.

Prior to December 1, 1978, the date the NGPA became effective, the maximum lawful prices for natural gas were expressed in volumetric units (thousands of cubic feet, or "Mcf's"). Recognizing, however, that all Mcf's of gas do not have the

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[2] Both the Federal Energy Regulatory Commission and its predecessor agency, the Federal Power Commission are referred to herein as the "Commission."

same energy content, the Commission included in most of its area and national rate orders, a proportional adjustment of the presecribed maximum lawful price, depending on whether the actual Btu content was greater or less than a prescribed base level. To determine the number of Btu's in a given volume of gas, the Commission adopted the so-called water-vapor-saturated standard (or "wet" method). *See* 18 C.F.R. § 2.56a(c)(1), 2.56b(d)(1). *See also Permian Basin II Area Rate Proceeding,* 50 F.P.C. 390, 403 (1973); *Other Southwest Area Rate Proceeding,* 46 F.P.C. 900, 924-25(1971); *Texas Gulf Coast Area Rate Proceeding,* 45 F.P.C. 674, 719 (1971); *Southern Louisiana Area Rate Proceeding,* 40 F.P.C. 530, 649 (1968). This standard was based on a wide-spread industry practice and has long been the basis used by the American Society for Testing Materials. *See Texaco, Inc.,* 33 F.P.C. 1228, 1236-37 (1965).

On November 15, 1978, shortly after the enactment of the NGPA, the Commission published proposed interim regulations implementing the Act (43 Fed. Reg. 53,270). Included within these regulations was a rule on Btu measurement which was in critical parts identical to the pre-NGPA Btu measurement rule. The preamble to the proposed interim rule described this provision as providing the "technical information" necessary to make the conversion, required by the pricing scheme of the NGPA, from volumetric units to Btu's (43 Fed. Reg. at 53,280). That technical information included the prior practice under the Natural Gas Act ("NGA") of converting the gas to water-vapor saturated conditions. The industry accordingly believed that the pre-NGPA practice of Btu measurement on a water-vapor-saturated basis, was being continued by the Commission. No comments were received on the proposed rule during the comment period and, on November 29, 1978, the identical text of the proposed rule was adopted exactly as proposed. The preamble to the regulations did not even mention the rule. *See* 43 Fed. Reg. 56,448 (December 1, 1978).

As a matter of fact, there is ample reason to believe the Commission shifted its course in midstream. After the interim regulations were adopted on November 29, 1978, the producers, which are the petitioners here, filed comments in which they accepted the interpretation that the interim regulations promulgated by the Commission adopted the "wet rule" (Pet. App. 11a) and after the 60 day comment period with respect to such regulations expired these same producers in February 1979 filed a petition for rehearing on that account. In April 1979, the Commission denied such application. If the Commission agreed with the producers' contention that the "dry rule" was the rule which it had promulgated, it did not say so in denying the application for rehearing. It appears that the Commission itself did not in November 1978 or even in April 1979 intend the interpretation it claimed it meant when for the first time in July 1980, it expressed that interpretation stating that interim regulation called for the "dry rule" interpretation.

As stated, on July 16, 1980, more than eighteen months after the interim regulation had been promulgated, the Commission promulgated the interpretation of the rule at issue here. Order No. 93, 45 Fed. Reg. 49,077 (July 23, 1980). The rule was issued as a final not as a proposed rule. The Order No. 93 rule differed from the interim final rule only in structure and format; it appeared in substance to be the same water-vapor-saturated rule that had been in effect under the NGA. However, in the preamble to Order No. 93, the Commission announced that, despite the explicit language of the interim rule, that rule "merely describes the test standard" for measuring Btu content. The results obtained under test conditions, the Commission said, must be "converted" to figures that reflect the actual water vapor conditions of natural gas on delivery (Pet. App., p. 43a). This interpretation of the interim rule was directly contradictory to that which was understood by the entire gas industry and to that which appears to have been intended by the Commission when it promulgated the interim regulation.

In Order No. 93-A (Pet. App., 51a-86a), issued April 24, 1981, nine months after Order No. 93, the Commission for the first time attempted to articulate a rationale for its already-established rule. In addition to characterizing Order No. 93 as "but a clarification of the interim rule" the Commission applied the rule retroactively to all first sales of natural gas made on or after December 1, 1978, the effective date of the interim rule (Pet. App., 73a).

In vacating Order Nos. 93 and 93-A, the court of appeals ruled that the FERC's adoption of the so-called "dry" rule was inconsistent with the pricing provisions of the NGPA as wll as the Congressional intent. it accordingly refused to defer to the Commission's rationale for the dry rule. (Pet. App., 30a). Because the court of appeals found the dry rule "not in accordance with law," it did not reach other issues raised by petitioners below. These included: whether the rule had been promulgated with sufficient notice and opportunity to comment; whether the rule had been improperly given retroactive.effect; or whether the Commission improperly failed to guarantee pipelines and distribution companies automatic pass through of any retroactive payments (*id.*).

SUMMARY OF REASONS FOR DENYING THE PETITIONS

This is not a case, as petitioners claim, in which the court of appeals properly should have deferred to the Commission. "Even according the Commission's rationale for the dry rule the respect traditionally due an agency's statutory interpretaion," the court of appeals said, "we find the Commission's dry rule . . to be fundamentally at odds with the Btu measurement technique implicit in the NGPA" (Pet. App., 30a). Having amply supported this finding, the precedents of this Court establish that the court of appeals need not defer to the administrative agency.

Nor does this case involve "an important question of federal law" (Supreme Court Rule 17). Significantly, petitioners do not argue that the court of appeals' decision will adversely impact the Commission's work under the NGPA. The fact is that it will have a positive impact. The Commission is now battling what it perceives to be a serious erosion of natural gas markets which it readily admits results in major part from natural gas prices which are too high. The court of appeals' decision results in *lower* natural gas prices. Hence, that decision cannot adversely impact implementation of the NGPA. It aids the work of the Commission.

Whether or not the Commission's interpretation of the NGPA is correct, its newly promulgated dry rule is void *ab initio*. The Commission's abandonment of its long-standing practice of using a water-vapor-saturated standard is riddled with not-yet-addressed (but raised below) violations of procedural due process. Most importantly, in promulgating its new dry rule, the Commission failed to provide interested parties adequate notice and opportunity to comment. This failure contravenes Section 502 of the NGPA, 15 U.S.C. § 3412, and the Administrative Procedure Act, 5 U.S.C. § 553.

REASONS FOR DENYING THE PETITION

I. The Court Of Appeals Properly Did Not Defer To The Commission's Unreasonable Interpretation Of The NGPA.

The Government's and the Producers' principal contention appears to be that the court of appeals should have deferred to the Commission's construction of the NGPA (FERC Br., 11; Exxon Br., 12-13). But, the court of appeals need not—indeed must not—defer to a regulatory agency's construction when it plainly has no support in the statute. As this Court recently observed, "this general principle of deference, while fundamental, only sets 'the framework for judicial analysis; it does not displace it.' " *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982), *quoting United States v. Cartwright*, 411 U.S. 546, 550 (1973).

In the instant case, the court of appeals gave the Commission all the deference it deserved as a regulatory body. The Commission's adoption of the "dry" rule is plainly out of step with the Btu measurement technique implicit in the NGPA. While petitioners base their argument on the precision that Congress used in establishing maximum ceiling prices under the NGPA (FERC Br., 11; Exxon Br., 16-17), it is precisely that meticulous care that undermines petitioners' position. At the time the Congress passed the NGPA, Btu content had been measured by the Commission on a "wet" basis for over fifteen years. That being so, as the court of appeals held (Pet. App., 24a), in the absence of clear Congressional intent to the contrary, it is most illogical to assume that Congress intended to shift to some other rule.

A contrary result is not required, as petitioners' urge (FERC Br., 11; Exxon Br., 16-17), by the fact that Congress established maximum ceiling prices "per MMbtu" rather than "per Mcf" as had been the Commission's practice in setting maximum lawful prices under the NGA. It simply takes too great a leap to conclude from this shift that Congress also intended to abandon

the "wet" rule. Indeed, as the court of appeals found (Pet. App., 25a-26a), there is considerable evidence that Congress assumed the "Mcf" and MMBtu" commodity units to be equivalent.[3]

The Producers' reliance on *Public Service Commission v. Mid-Louisiana Gas Company,* Nos. 81-1889 *et al.* (June 28, 1983), as precedent for their position, is entirely misplaced. There, refusing to defer to the Commission's interpretation of the NGPA that Congress implicitly intended to exempt pipeline production from an otherwise comprehensive regulatory scheme, this Court held that the Commission's position was contrary to the history, structure and basic philosophy of the NGPA. That holding is equally valid here.

The court of appeals, accordingly, properly refused to defer to the Commission's construction of the statute. The courts are the final authorities on issues of statutory construction. They are not required "to stand aside and rubber-stamp" agency decisions that are inconsistent with the statutory mandate or frustrate Congressional policy. *Securities and Exchange Commission v. Sloan,* 436 U.S. 103, 118 (1978) (quoting *NLRB v. Brown,* 380 U.S 278, 291 (1965) and *Volkswagenwerk v. FMC,* 390 U.S. 261, 272 (1968); *Public Service Commission v. Mid-Louisiana Gas Co., supra.*

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[3] Petitioners ignore the court of appeals inescapable logic that the initial NGPA price for Section 102 gas of $1.75/MMBtu was identical to the price that President Carter proposed, 1.75/Mcf, and that the NGPA initial price for Section 106 gas was set at 54¢/Mcf, the price established by the Commission for such gas under the just and reasonable mandates of the NGA (Pet. App., 26a). Moreover the inter-fuel Btu comparisons made in other statutory provisions enacted contemporaneously with Title I of the NGPA suggest that Congress was apparently willing to use standard conversion factors (see Pet. App., 28a).

II. The Work of the Commission Will Not Be Adversely Impacted By the Court of Appeals Decision.

While the Government asserts that a question of "fundamental importance" to the Commission's implementation of the NGPA is presented (FERC Br., 10), importantly, neither the Government nor the Producers claim that the court of appeals' decision will have an adverse impact on the Commission's implementation of the NGPA. Nor can they. One of the most serious problems confronting the natural gas industry today—according to the Commission—is over-supply. Faced with a softening of consumer demand and with alternate fuel prices which are lower than the price of natural gas, the industry is undergoing a serious erosion of natural gas markets. *See* e.g. *Tennessee Gas Pipe Line Company,* Docket No. CP82-502-000, application filed September 8, 1983 [applicant shows a daily surplus of 100% and annual surplus of 65%]; and *United Gas Pipeline Company,* Docket No. CP83-397-000, application filed June 30, 1983 [applicant estimates a drop in sales level to 500 Bcf from over 1,000 Bcf in 1981]. And, the Commission last December, said nothing "in recently available data evidences that an end to the current surplus is imminent." *Transcontinental Gas Pipeline Corporation,* Docket No. CP80-485-000 (December 22, 1983), 25 FERC ¶ 61,418 at 61,397. The Commission attributes the cause of these problems in part to the large increases in the price of natural gas which followed passage of the NGPA. *See e.g. Transcontinental Gas Pipe Line Corporation, supra.*[4]

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[4] To aid market-ordering, the Commission has approved a number of special marketing programs which are intended to help reduce the price of gas and relieve the pressures of over-supply. *See e. g. Tenneco Oil Company,* Docket No. CI83-269-000 (November 10, 1983), 25 FERC ¶ 61,234; *Transcontinental Gas Pipe Line Corp.,* Docket Nos. RP83-11-000 and RP83-30-000 (November 10, 1983), 25 FERC ¶ 61,219; and *Columbia Gas Transmission Company,* Docket No. CP83-452-000 (November 10, 1983), 25 FERC ¶ 61,220. In approving these special programs, the Commission took notice of "the surplus in

The court of appeals' decision will help—not hinder—the Commission in its quest for a solution to the industry's marketing problems. That decision produces lower natural gas prices and will make natural gas prices more competitive with alternate fuels. Hence, rather than having an adverse impact on the Commission's implementation of the NGPA, the court of appeals' decision will have a positive impact.

If there is any validity—and we do not agree that there is—to the Government's alternative argument that the Congress left the matter to the interpretation of the Commission (FERC Br., 18), the Commission's exercise of that discretion in adopting the dry rule is clearly an abdication of its primary responsibility. Under its statutory mandate contained in the NGA, the Commission is charged with the responsibility of protecting consumers "against exploitation at the hands of natural gas companies." *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944). The NGA was passed—this Court said—"to afford consumers [not natural gas producers] a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Refining Co. v. Public Service Commission*, 360 U.S. 378, 388 (1959). The Commission's use of—or its discretion to adopt—a rule which *raises* natural gas prices clearly stands this policy on its head. Indeed, the Commission's insistence on vindication of its inflationary dry rule when "the average natural gas price has overshot competitive, market-

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the market; the general decline in gas sales; the high price of gas which was contributing to erosion of traditional markets and prevented attachment of new markets; the fact that prices had not responded quickly to market pressure; and the increase in take-or-pay exposure faced by many pipelines." *Tenneco Oil Company*, Docket No. CI83-269-000 (slip op, 2) (order on rehearing, January 16, 1984). "[S]urplus problems," the Commission said, "have ... reached critical proportions and require immediate attention. Take-or-pay liability of the interstate pipelines has risen to unprecedented levels" (*id.* at 10).

clearing levels in many regions"[5] of the country, is puzzling to say the least.

Under these circumstances, further review by this Court is unwarranted.

III. Whether Or Not The Commission's Interpretation Is Correct, Its Btu Rule Is Void Ab Initio Because Of Violations Of Procedural Due Process.

In implementing the NGPA by rulemaking, the Commission is required by statute to provide interested persons with notice and prior opportunity to comment both in writing and, to the extent practicable, orally. 15 U.S.C. § 3412; 5 U.S.C. § 553 (b), (c). In the instant case, the Commission did not obey this mandate. Neither the proposed interim nor the final interim rules advised interested parties that the Commission was considering a change in its historical practice of measuring Btu content on a standard, water-vapor-saturated basis. It was not until the Commission issued its final rule in Order No. 93 that it first indicated that a reversal of prior practice had been under consideration. And, to compound its procedural errors, the Commission in the same order applied the new rule retroactively to December 1, 1978.[6]

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[5] Statement of Policy on Off-System Sales, 23 FERC ¶ 61,140 at 61309 (April 25, 1983)(concurring opinion of Chairman Butler).

[6] In addition to these procedural errors, the Commision also erred in failing to guarantee pipeline and distribution companies automatic pass through of any retroactive payment. This failure violates Section 601 of the NGPA, 15 U.S.C. §§ 3431 (c) (Supp. III 1979). Because the court of appeals found the Commission's rule "not in accordance with law," it did not reach this issue.

It is settled under the Administrative Procedure Act that an administrative agency must provide prior and specific notice (in a concrete and focused form) of its proposed actions in order to invite meaningful public comment. *See e.g. National Tour Brokers Ass'n v. United States,* 591 F. 2d 896 (D.C. Cir. 1978); *Home Box Office Inc. v. Federal Communications Commission,* 567 F.2d 9 (D.C. Cir.), certiorari denied, 403 U.S. 923 (1971). That notice must be even more specific when, as here, the agency departs from long-standing industry and agency practices, and adopts a rule which even it knows has a different meaning than anybody else thought it had. In such event, the agency must give specific notice that the standard is being changed. *Greater Boston Television Corp. v. Federal Communication Commission,* 444 F. 2d 841 (D.C. Cir.), certiorari denied, 403 U.S. 923 (1971). And, the agency may apply the changed standard only to those actions taken by parties after the new standard has been proclaimed as in effect. *Boston Edison Co. v. Federal Power Commission,* 557 F. 2d 845 (D.C. Cir.), certiorari denied sub nom. *Norwood v. Boston Edison Co.,* 434 U.S. 956 (1977).

Hence, whether or not the Commission's interpretation of the NGPA is correct, since the Commission failed to provide the requisite notice and opportunity for public comment, its order has to be found void *ab initio.*

CONCLUSION

For the reasons stated, the petitions for a writ of certiorari should be denied.

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February 16, 1984

APPENDIX

APPENDIX

Section 502(a), Natural Gas Policy Act

> ADMINISTRATIVE PROCEDURE ACT.—Subject to subsection (b), the provisions of subchapter II of chapter 5 of title 5, United States Code [the APA], shall apply to any rule or order issued under this Act having the applicability and effect of a rule as defined in section 551(4) of title 5, United States Code; except that sections 554, 556, and 557 of such title 5 shall not apply to any order under section 301, 302, or 303.

See 15 U.S.C. § 3412(a).

Section 502(b), Natural Gas Policy Act

> OPPORTUNITY FOR ORAL PRESENTATIONS.—To the maximum extent practicable, an opportunity for oral presentation of data, views, and arguments shall be afforded with respect to any proposed rule or order described in subsection (a) (other than an order under section 301, 302, or 303). To the maximum extent practicable, such opportunity shall be afforded before the effective date of such rule or order. Such opportunity shall be afforded no later than 30 days after such date in the case of a waiver of the entire comment period under section 553(d)(3) of title 5, United States Code, and no later than 45 days after such date in all other cases. A transcript shall be made of any such oral presentation.

See 15 U.S.C. § 3412(b).

Administrative Procedure Act

5 U.S.C. § 553(b)(3).

> General notice of proposed rulemaking shall . . . include . . . either the terms or substance of the proposed rule or a description of the subjects and issues involved....

5 U.S.C. § 553(c).

> After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose....

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 83-1171

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

EXXON CORPORATION, *et al.*,
Petitioners,

v.

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *et al.*,
Respondents.

REPLY OF EXXON CORPORATION, ET AL., TO BRIEFS IN OPPOSITION

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IN THE

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OCTOBER TERM, 1983

No. 83-1171

EXXON CORPORATION, *et al.*,
Petitioners,

v.

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *et al.*,
Respondents.

REPLY OF EXXON CORPORATION, ET AL., TO BRIEFS IN OPPOSITION

Petitioners Exxon Corporation, *et al.* ("Producers"), hereby reply to two arguments raised by the Respondents[1] in opposition to the petitions for a writ of certiorari filed by Producers and by the Federal Energy Regulatory Commission ("Commission") (No. 83-1171). These arguments are (i) that neither the Producers nor the Commission argued to the court of appeals that the Commission lawfully exercised its rulemaking authority in promulgating the rule here on review, and (ii) that this Court should not grant certiorari because of alleged

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[1] Respondents are the Interstate Natural Gas Association of America, ANR Pipeline Company (formerly Michigan Wisconsin Pipe Line Company), Mississippi River Transmission Corporation, Natural Gas Pipeline Company of America, Northern Natural Gas Company, Division of InterNorth, Inc., and Transcontinental Gas Pipe Line Corporation ("Pipelines"); Associated Gas Distributors ("AGD"); and Laclede Gas Company ("Laclede"). The Public Service Commission of the State of New York and the Commonwealth of Kentucky Public Service Commission filed a brief *amicus curiae* in opposition to the petitions for a writ of certiorari.

procedural defects in the proceedings before the Commission. Respondents' other arguments are answered in the petitions.[2]

REASONS

I. THE QUESTION OF THE SCOPE OF THE COMMISSION'S DISCRETIONARY RULEMAKING AUTHORITY WAS FULLY BRIEFED AND ARGUED BEFORE THE COURT OF APPEALS.

Respondents argue that the Commission and the Producers are foreclosed from arguing in the alternative before this Court that the Commission lawfully exercised its discretionary rulemaking authority under the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. § 3301, *et seq.* (Supp. V 1981), in promulgating the rule here on review.[3] The Respondents' position is based on the erroneous assertion that the argument regarding the Commission's discretionary rulemaking authority was not raised before the court of appeals.

It is correct that both the Commission and Producers argued before the court of appeals that the Commission's so-called "dry rule" was an interpretive rule required by the NGPA. Nevertheless as the court of appeals itself recognized (App. 19a-21a; see also, App. 9a and 33a), the Commission and Producers also argued alternatively that the rule was a valid and reasonable rule issued by the Commission pursuant to its discretionary rulemaking

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[2] Respodent AGD (Brief at 4) asserts that "the full court [of appeals] sitting *en banc* denied the suggestions" for rehearing *en banc*. Contrary to AGD's assertion, four of the judges of the Court of Appeals (Circuit Judges Wright, Tamm, Bork and Starr) did not participate in the order denying these suggestions. App. 155a.

[3] Brief in Opposition of Named Pipeline Respondents at 9-10 and 21-23; Brief *Amicus Curiae* for the Public Service Commission of the State of New York and the Commonwealth of Kentucky Public Service Commission in Opposition at 7; Brief in Opposition for Respondent Associated Gas Distributors at 7-8.

authority and was issued in conformity with the NGPA and Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* (1976).[4]

The briefs presented to the court of appeals unequivocally confirm that the question of Commission's discretionary authority to promulgate the "dry rule" was fully argued and presented below. Before the court of appeals, Respondents and parties aligned with them squarely addressed the issue. Indeed, contrary to AGD's present assertions (Brief at 7), the brief to the court of appeals of Lone Star Gas Company, the pertinent portions of which were adopted by reference by Respondents AGD and Laclede, stated that, "[a]t a minimum, the method of determining the number of Btu's in a given volume of gas is an issue of administration and word definition that was left to the Commission. *See* NGPA §§ 501(a) and (b), 15 U.S.C. §§ 3411(a) and (b)."[5]

In fact, Respondents' own arguments to the court of appeals with respect to alleged procedural defects would have been without foundation if they had claimed then, as they now assert, that the Commission lacked discre-

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[4] *Interstate Natural Gas Association of America* v. *FERC*, D.C. Cir. Nos. 81-1690, *et al.*, Brief Of Producer Intervenors at 26-29 (Appendix A at 1a-3a); *id.*, Brief For Respondent Federal Energy Regulatory Commission at 25-27 (Appendix B at 4a-5a).

[5] *Interstate Natural Gas Association of America* v. *FERC*, D.C. Cir. Nos. 81-1690, *et al.*, Brief For Petitioner Lone Star Gas Company at 24 n.31 (Appendix C at 6a n.31); see, *e.g.*, *id.*, Brief Of Petitioners Michigan Wisconsin Pipe Line Company (now ANR Pipeline Company), *et al.*, at 30-36 (Appendix D); *id.*, Brief Of Petitioner Associated Gas Distributors at 4-5 (Appendix E); *id.*, Brief Of Petitioner Laclede Gas Company Joining In And Adopting Brief Of Lone Star Gas Company at 2-3 (Appendix F); *id.*, Reply Brief Of Petitioner Lone Star Gas Company at 3-6 (Appendix G) (adopted by Respondent Laclede (Reply Brief Of Petitioner Laclede Gas Company Joining In And Adopting Reply Brief Of Lone Star Gas Company at 1-2 (Appendix H))).

tion to prescribe the method of Btu measurement. Instead, Respondents argued below that the Commission erred by failing to give adequate notice and opportunity for comment for its rule and by giving the rule retroactive effect. App. 19a-20a. These arguments would have been totally irrelevant if the Commission had had no discretionary authority to issue a rule prescribing the method of Btu measurement in the first place.

II. THE PETITIONS RAISE IMPORTANT QUESTIONS OF FEDERAL LAW WHICH ARE NOT AFFECTED BY THE ALLEGED PROCEDURAL DEFECTS.

The Pipelines (Br. 10, 28-29) and Laclede (Br. 11-12) suggest that the petitions should be denied because of alleged procedural defects in the proceedings before the Commission. The Producers and the Commission refuted these allegations in the court of appeals, showing that the Commission properly followed the NGPA and the Administrative Procedure Act. App. 20a. The court of appeals did not reach these issues, as it found the Commission's rule to be inconsistent with the NGPA. App. 33a; see also, App. 9a.

Respondents' suggestions of procedural defects simply are not relevant to the issues before this Court. Their arguments provide no basis for denying the petitions which raise important questions of federal law which have not been, but should be, settled by this Court. See, Sup. Ct. Rule 17.1(c).

CONCLUSION

For these reasons and those set forth in the petitions, the petitions for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

Excerpts from Brief Of Producer Intervenors in *Interstate Natural Gas Association Of America* v. *FERC*, D.C. Cir. Nos. 81-1690, *et al.*

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* * * * *

III. Order Nos. 93 and 93-A are Reasonable.

As shown above, the NGPA requires that ceiling prices apply on an as-delivered basis for each MMBtu of gas sold and delivered. Alternatively, to the extent the Court may find that the Commission has discretion in this area, Order Nos. 93 and 93-A represented a reasonable exercise of the Commission's authority to promulgate regulations designed to account for actual heating value of natural gas sold under the NGPA. Indeed, it would have been an abuse of discretion for the Commission to have promulgated a rule that would have understated the Btu content of the gas delivered.

In reviewing agency rules, the Court does "not inquire into the wisdom of the regulations that the Commission promulgates, and [it] inquire[s] into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported". *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972).

In *National Small Shipments Traffic Conference, Inc.* v. *Civil Aeronautics Board*, 199 U.S. App. D.C. 335, 618 F.2d 819 (D.C. Cir. 1980), this Court summarized the standard of review for rulemaking proceedings:

> Our role as a reviewing court is a limited one. We must affirm the challenged regulations unless we find that the [Commission's] decision was "arbitrary and capricious," * * * or in excess of its statutory authority, * * * or adopted without the observance of the procedure required by law * * * . The "ar-

> bitrary and capricious standard of review is highly deferential. * * * It presumes that the agency's action is valid. * * * and we must affirm the [Commission's] regulations if a rational basis for the [Commission's] decision is presented. * * * Of course, this does not mean that our function is merely to rubberstamp the agency's decision. Rather, we must assure ourselves that the decision was "based on a consideration of the relevant factors", * * * and "that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent." 199 U.S. App. D.C. at 342-43, 618 F.2d at 826-27.

Hence, the scope of review is severally circumscribed. So long as the resulting regulation is neither arbitrary nor capricious and is "reasonably related to the purposes of the enabling legislation", it will be sustained. *Morning* v. *Family Publications Service*, 411 U.S. 356 (1973).

On November 9, 1978, the Natural Gas Policy Act of 1978 (NGPA) was signed into law. By passage of the NGPA, Congress mandated a new legislative framework for the regulation of most facets of the natural gas industry, including a series of specific statutory maximum price levels applicable to "first sales" of natural gas. These statutory ceiling prices are stated in cents "per million Btu".

The Commission was directed to administer essentially all of the NGPA and was authorized to perform any and all acts and to prescribe and issue such rules and orders as it found necessary or appropriate to carry out its functions under the NGPA.

Pursuant to its authority, the Commission promulgated Section 270.204 of its regulations. Section 270.204 described a standard method for measuring gas by adjusting the results obtained under saturated conditions to

reflect the heating value of gas at actual delivery conditions, whatever those conditions are for a particular first sale. Because water vapor displaces energy-producing hydrocarbon molecules, heating value per unit of natural gas varies inversely with water vapor content. As a result, there is often a significant disparity between the heating value of gas at the assumed "standard" conditions and its heating value of natural gas actually delivered by the producer.

Because almost all gas sold in this country is not saturated with water vapor, the adjustment to actual delivery conditions avoids understatement of heating value. In addition this properly prices any gas that may in fact be sold on a saturated with water vapor basis. Under the procedures promulgated by the Commission, gas is priced based on its actual condition, "saturated", "dry" or in between, resulting in neither understatement nor overstatement of Btu content.

As demonstrated above and in Part II of the Statement of the Case, Petitioner's challenge to Section 270.204 herein would have the Commission adopt a method which produces a theoretical quantity of Btu's based on the arbitrary assumption that the gas is "saturated" with water vapor, thereby forcing an artificially low measure of Btu content for any gas which is not saturated with water vapor. If gas which in fact is not water saturated is assumed, for purposes of determining Btu content, to be water saturated, the purchaser would receive up to 1.74 percent of the Btu content of the gas stream for free.

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APPENDIX B

Excerpts from Brief For Respondent Federal Energy Regulatory Commission in *Interstate Natural Gas Association Of America* v. *FERC*, D.C. Cir. Nos. 81-1690, *et al.*

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* * * * *

The NGPA itself, on November 9, 1978, gave notice of a different pricing scheme when it expressed prices for "delivered" gas in Btu terms rather than in volumetric terms. Four days later (on November 13) the Commission gave notice, in proposed § 270.204, of its intent to issue a rule concerning the measurement of the heat content of gas. (R. 805). The interim rule issued November 29, 1978, reiterated that intent. At very least, therefore, Petitioners were by that time on notice of the "subjects and issues involved" 5 U.S.C. § 553(b)(3).[27] Subsequently, in January 1979 the producers submitted comments suggesting that heat content be measured on an "as-delivered" basis. Numerous comments (including some filed by Petitioners) were submitted and considered by the Commission before the Commission issued its final rule on Btu content some 18 months later.

In these circumstances, it is difficult to comprehend Petitioners' claim that the Commission's notice and comment procedures were inadequate or that they were effectively unable to comment before they knew the old method

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[27] This is particularly true since the Commission stated in its *Final Interim Regulations* that it:

> . . . solicits comments on all aspects of these interim regulations. It should be emphasized that the Commission intends to review the regulations in their entirety and make whatever changes it deems appropriate based on the comments already received, additional written comments, the views expressed in public hearings, and experiences under the regulations during the next 60 days (R. 1762).

of Btu measurement was in jeopardy. There is no requirement that the agency forecast in its notice of rulemaking what it will ultimately conclude in its final rule. It hardly needs saying that it would frustrate the very purpose of the notice and comment procedures if the agency were bound to adopt only the precise terms of its original notice of proposed rule. See *American Federation of Government Employees* v. *Block*, 655 F.2d 1153, 1158 (D.C. Cir. 1981).

There is no merit to Petitioners' further claim (Lone Star Br. 22) that the Commission has a particularly heavy notice burden because it has "depart[ed] from longstanding industry and agency practice." Under the cases Petitioners cite, (*id.* at 27-28), the agency has the burden to fully explain any departure in its final conclusion from its past practice. That was done here. There is no suggestion in those cases that the agency must provide any more notice than the APA requires. *See* generally, *Vermont Yankee Power Corp.* v. *NRDC*, 435 U.S. 519 (1978).

Nor do the other cases Petitioners cite offer any support for their position. *National Tour Brokers Assn.* v. *United States*, 591 F.2d 896 (D.C. Cir. 1978) is not relevant because the problem the Court dealt with in that case—*i.e.*, the agency had not made clear any intent to issue a rule rather than to suggest that Congress enact legislation—is not present here. There is no question here that the Commission had, from the outset in November 1978, commenced a formal rulemaking. Neither is *Rodway* v. *U.S.D.A.*, 514 F.2d 809 (D.C. Cir. 1975) supportive of Petitioners' claim in the circumstances of this case. In *Rodway* the agency had failed to mention at all in its notice the subject of the ultimate regulation (a coupon allotment system). As explained above, the subject matter of 18 C.F.R. § 270.204 —the method of determining Btu content of gas—was made clear at least as early as November 13, 1978 in the Commission's notice of proposed rulemaking.

APPENDIX C

Excerpts from Brief For Petitioner Lone Star Gas Company in *Interstate Natural Gas Association Of America* v. *FERC*, D.C. Cir. Nos. 81-1690, *et al.*

C. Notice Was Not Inherent in the Enactment of the NGPA.

The Commission suggests that, even if it had not provided concrete and focused notice that it was considering an as-delivered Btu measurement rule, such notice was not necessary because it was inherent in the fact that the NGPA "created dramatic and comprehensive changes in longstanding approaches to producer pricing." [31]

There are two fatal defects in this suggestion—one legal and the other factual. The legal defect is that the

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[31] Response of the FERC in Opposition to Motion of Petitioner for Limited Stay Pending Review, filed August 14, 1981, at 9; Response of the FERC in Opposition to Motion of Petitioner for Limited Stay Pending Review, filed January 25, 1982, at 14.

The Commission's assertion that the NGPA and its legislative history provided notice for purposes of rulemaking is different from the arguments made by the Producer Intervenors that the NGPA required Btu measurement at as-delivered conditions or by some of the petitioners that the NGPA required measurement at water-vapor-saturated conditions. Lone Star submits that the statute and the legislative history are devoid of any affirmative requirement of as-delivered Btu measurement, and therefore congressional intent to overturn longstanding administrative practice cannot be inferred. *See Bush v. Oceans International*, 621 F.2d 207, 210 (5th Cir. 1980); *Toilet Goods Ass'n v. Finch*, 419 F.2d 21, 27 (2d Cir. 1969). At a minimum, the method of determining the number of Btu's in a given volume of gas is an issue of administration and word definition that was left to the Commission. *See* NGPA §§ 501(a) and (b), 15 U.S.C. §§ 3411(a) and (b). Arguably, Congress intended to go further and incorporate the historical Btu measurement rule into the pricing mandates of the NGPA, at least with respect to those categories of gas priced in accordance with historical "just and reasonable" rates.

Commission cannot rely on the Congress to fulfill its duties under the APA. This Court has explicitly rejected the argument that the legislative history of a statute authorizing a challenged regulation could provide the requisite APA notice. In *Rodway v. USDA*, 514 F.2d 809, 815 (D.C. Cir. 1975), this Court concluded that:

> [e]ven if the legislative history fully supported the Secretary's view of the law, it cannot seriously be asserted that the congressional debates provided more than constructive notice to appellants. Only publication in the *Federal Register* meets the APA requirement of constructive notice.

The factual flaw is that one searches the NGPA and its legislative history in vain for any indication that Congress ever considered Btu measurement methodology, much less that it gave any specific direction to the Commission on the subject. The NGPA's requirement that maximum lawful prices be expressed in terms of dollars per million Btu's certainly did not, by itself, put the industry on notice that the Commission either was changing or was considering changing the method of measuring Btu content: The issue of *whether* gas prices are to be expressed on a Btu content basis is simply different from the time of *how* Btu content is to be measured.

The Commission has implied that an as-delivered Btu measurement rule is necessary to maintain consistency with the NGPA scheme of pricing gas on an energy value basis. Order 93-A (R. 130-31). But the only change Congress made in this regard is that it required the expression of maximum prices in dollars per million Btus. The requirement that maximum prices be adjusted to reflect energy value was part of the NGA scheme. Indeed, the Commission concedes that water-vapor saturated measurement is no more inconsistent with the pricing scheme of the NGPA than it was with the area and national rate pricing scheme under the NGA. *See id.* (R. 150-54). If that is the case, then the indus-

try could hardly have been expected to conclude from the enactment of the NGPA pricing scheme that a change in the Btu measurement rule would naturally follow.

In sum, there was nothing inherent in the change from Mcf to Btu pricing that also suggested a change in the Commission's long-standing rules regarding Btu measurement, and even if there had been such a suggestion, it would not have provided the requisite APA notice.

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APPENDIX D

Excerpts from Brief Of Petitioners Michigan Wisconsin Pipe Line Company (now ANR Pipeline Company), *et al.*, in *Interstate Natural Gas Association Of America* v. *FERC*, D.C. Cir. Nos. 81-1690, *et al.*

III. ASSUMING THAT THE COMMISSION HAD DISCRETION TO CHANGE LONG-STANDING POLICY CONCERNING BTU MEASUREMENT, IT HAS ABUSED ITS DISCRETION IN THIS CASE

In Sections I and II, above, it has been shown not only that the NGPA does not *require* the Commission to change from the "saturated" basis of Btu measurement, but also does not *permit* it. This Section III, however, is premised on the *arguendo* assumption that the Commission does have *discretion* to change such method. Even if that were true, the fact is that the Commission's attempt to make that change, in the orders here under review, is still invalid, because the Commission has violated procedural and substantive requirements.

Even if it were assumed that the Commission has the power under the NGPA to alter by rule the historical method employed in the natural gas industry for Btu measurement, the Commission is nevertheless required to observe the procedural requirements of the Administrative Procedure Act, ("APA") 5 U.S.C. § 551, *et seq.*,[17], ruling case law and constitutional due process. Namely, persons affected by Commission proposals are entitled to meaningful notice of the change that is proposed, and a reasonable opportunity to comment thereon, *prior* to enactment of new regulations. In this case, the Commis-

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[17] Section 502(a) of the NGPA makes the procedural requirements of the APA applicable to informal rulemaking by the Commission under the Act. There can be no question that Section 270.204, promulgated by the orders here under review, qualifies as a rule within the meaning of Section 551(4) of the APA.

sion failed totally to provide prior notice of its intent to change the historical method of determining the Btu content of natural gas, and thereby deprived parties of any meaningful opportunity to comment thereon. As such, the regulation promulgated in the Orders here under review is invalid and this Court should vacate such regulation. *See, e.g., Joseph* v. *Civil Service Commission*, 554 F.2d 1140 (D.C. Cir. 1977); *Lewis-Mota* v. *Secretary of Labor*, 469 F.2d 478 (2d Cir. 1972).

Courts have consistently held that "the opportunity to comment after promulgation [of a regulation] cannot substitute for notice and an opportunity to comment beforehand." *Mobil Oil Corp.* v. *DOE*, 610 F.2d 796, 804 n. 9 (Temp. Emer. Ct. App. 1979), *cert. denied*, 446 U.S. 937 (1980). In these proceedings, on November 15, 1978, the Commission issued a notice of proposed interim regulations to be promulgated under the NGPA, which included § 270.204. In its Notice, the Commission described the proposed § 270.204 in the following terms:

> Finally, § 270.204 presents the technical information necessary to determine the number of British thermal units (Btu's) per unit volume of natural gas. This is *necessary* because maximum lawful prices for first sales of natural gas are stated in terms of dollars per million Btu's. (43 *Fed. Reg.* 53280 (1978), emphasis added).

On December 1, 1978, the interim regulations were issued, with no change in § 270.204 from the language proposed by the Commission in the notice and with no additional discussion of this section. The plain meaning of § 270.204 of the interim regulations, and the purpose thereof as expressed by the Commission in the above-quoted language, gives absolutely no indication that the Commission intended a radical departure from the historical method of pricing natural gas on an energy basis according to the number of Btu's per unit of volume

measured on a saturated basis. In fact, there *was* no such intent then. Indeed, the Commission itself stated that the "technical information" provided in § 270.204 was *necessary* because pricing under the NGPA was mandated on the basis of "dollars per million Btu's." There was absolutely no indication that computation of the Btu content of gas in accordance with the regulation would be subject to an unexpressed *further adjustment* to abandon the saturated basis, to measure the Btu content of gas.

It was not until Order No. 93 was issued *on July 16, 1980*, that the Commission purported to "clarify" its intent in issuing § 270.204 of the interim regulations, and that was in a single sentence out of 19 pages of text. It was not until Order No. 93-A was issued, *on April 24, 1981*, that the Commission's new purpose was clearly stated, but with a very dubious after-the-fact rationalization of its earlier error:

> The Commissions' intent in issuing the interim Btu rule [§ 270.204] was merely to describe the standard conditions for measuring the Btu content of natural gas. Unlike the Commissions previous policy, this measurement was *not* to be 'used in computing [a] rate adjustment.' R. 141-142.

Thus, in Order No. 93-A, the Commission finally stated, *for the first time*, that the so-called "interim Btu rule" was completely *unnecessary* for purposes of pricing gas under the NGPA, in contrast to its earlier characterization that the "technical information" set forth in the rule was "necessary because maximum lawful prices for first sales of natural gas are stated in terms of dollars per million Btu's". (43 *Fed. Reg.* 53280 (1978)).[18] The

[18] It was not until December 24, 1981 that the Commission amended § 270.204 to finally clearly provide in the rule that "[t]he maximum lawful price prescribed by the NGPA and this part for any first sale of natural gas applies to the Btu's actually delivered in that first sale." R. 325.

latter-day "clarification" by the Commission can only be rationally viewed as a substantive change. However, it would make a farce of the procedures mandated by the APA and of the Due Process Clause if an agency were allowed to effectively impute notice, after-the-fact, by purporting to "clarify" its original intent with a later explanation which is contrary to the very terms included in the initial Orders. In *National Tour Brokers Association* v. *United States*, 591 F.2d 896, 902 (D.C. Cir. 1978), this Court held that the purpose of the procedural requirements of notice and comment is "to see to it that the agency maintains a flexible and open-minded attitude towards its own rules, which might be lost if the agency had already put its credibility on the line in the form of 'final' rules." The loss of objectivity condemned by this Court in *National Tour* is clearly presented in the instant case, where the *first* indication that the Commission was ever considering a change in its long-standing policy regarding measuring Btu content came in the order issuing the *final regulation*. This Court, in *National Tour*, suggested the nature of adequate procedures, as follows:

> The order of procedure must be, *first*, to notice the proposed rule, *then* to receive comments and evidence directed toward this proposed rule, and, *finally*, to promulgate the final rule. *Id.* at 902 (emphasis added).

By no means can a *final* rule be deemed adequate notice, yet in the subject proceedings there was *no* indication, until the final rule was issued, that the saturated basis was to be abandoned for billing purposes or that such a radical change was even under consideration, and even after that, it took well over a year before the regulation was altered to actually state the change.

Moreover, this Court has held that *clear* notice of proposed rules by an agency is a prerequisite to valid promulgation. For example, in *Home Box Office, Inc.* v. *FCC*,

567 F.2d 9, 36 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 829 (1977), this Court held,

> [A]n agency proposing informal rulemaking has an obligation to make its view known to the public *in a concrete and focused form* so as to make criticism or formulation of alternatives possible. (emphasis supplied).

In this case, the Commission not only proposed a rule without any indication of its view that historical Btu measurement practices (used consistently in the industry for decades) were intended to become superfluous under the new statute, but also issued a regulation which, when read in context with established Commission policy and industry practice, gave precisely the opposite indication. Both pipelines and producers—parties with adverse interests in this matter—interpreted the Commission's "intent" in issuing § 270.204 of the Interim Regulations in the *same* fashion, *i.e.*, that the prices per MMBtu of natural gas under the NGPA would apply to the Btu content of the gas stream measured under the standard conditions (saturated basis) set forth in Section 270.204 of the Commissions' Interim Regulations.[19] Indeed, if the Commission's "intent" had been other than what was then universally accepted, there would have been a real question why the "technical information" was issued as a regulation at all.[20]

The fact that the Commission ultimately adopted the position put forward in certain comments submitted by

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[19] See note 8 *supra*.

[20] As matters now stand, the addition of subsection (c) to Section 270.204 of the Regulations on December 24, 1981 renders subsections (a) and (b) surplusage. The Commission has never explained why it was necessary to issue a regulation governing the determination of Btu content at standard conditions when such a determination is totally irrelevant for purposes of applying the NGPA's maximum lawful prices, under the Commission's new found position.

certain producers on § 270.204 of the Interim Regulations is also irrelevant on the question of proper notice. The fact is that *the Commission* never indicated, in its notice or interim regulations that it was considering a change in established Btu measurement policy. Parties that may be affected by proposals *of other parties* cannot properly be charged with notice by virtue of a proposal raised for the first time in another party's comments.[21] In *Wagner Electric Corp.* v. *Volpe*, 466 F.2d 1013, 1020 (3d Cir. 1972), the Court held:

> Section 4(b) of the Administrative Procedure Act requires notice *before* rulemaking, not after. The right of interested persons to petition for the issuance, amendment or repeal of a rule, granted in Section 4(e) of that Act, is neither a substitute for nor an alternative to compliance with the mandatory notice requirements of Section 4(b).

Thus, the fact that some natural gas producers filed comments with respect to § 270.204 of the Interim Regulation, which objected to such regulation on the grounds that the NGPA allegedly required measuring on the basis of Btu's actually delivered, is not a substitute for clear and unambiguous notice from the agency. The Commission indicated an intent to promulgate its "as delivered" regulation in Order No. 93, at the earliest, without notice. The *post hoc* fiction that interested parties were obligated to divine that Commission intent from the interim regulations, which give no hint whatsoever of changing historical measurement practice, is totally ineffectual as an effort to cure the fatal procedural defect in the regulations.

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[21] In this rulemaking proceeding and in most others before the Commission, parties are not required to serve their comments on other parties. Thus, at best, the pipelines here had only constructive notice of these comments, rather than actual notice.

APPENDIX E

Excerpts from Brief Of Petitioner Associated Gas Distributors in *Interstate Natural Gas Association Of America* v. *FERC*, D.C. Cir. Nos. 81-1690, *et al.*

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ARGUMENT

I. IT WAS AN ABUSE OF DISCRETION, ARBITRARY AND CAPRICIOUS, AND CONTRARY TO LAW TO MAKE SECTION 270.204, AS LATER INTERPRETED AND AMENDED, EFFECTIVE RETROACTIVELY TO DECEMBER 1, 1978.

In support of this contention, AGD adopts by reference, pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, the Argument sections I and II of the Brief for Lone Star Gas Company.

II. IN PROMULGATING SECTION 270.204 OF ITS REGULATIONS, THE COMMISSION UNLAWFULLY FAILED TO PROVIDE ADEQUATE NOTICE AND OPPORTUNITY TO COMMENT.

In support of this contention, AGD adopts by reference, pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, the Argument sections I and II of the Brief for Lone Star Gas Company.

* * * * *

APPENDIX F

Excerpts from Brief Of Petitioner Laclede Gas Company Joining In And Adopting Brief Of Lone Star Gas Company in *Interstate Natural Gas Association Of America* v. *FERC*, D.C. Cir. Nos. 81-1690, *et al.*

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* * * * *

Petitioner has urged Respondent to implement Order Nos. 93 and 93-A on a prospective basis only, to the end that this nation's gas consumers not be required to provide natural gas producers with the enormous windfall that will result from a retroactive application of those orders back to December 1, 1978.

In support of that position, Laclede joins in and adopts as its own the Brief being filed herein this date by Lone Star Gas Company.[2] Petitioner has carefully reviewed that Brief and, for the reasons set forth therein, urges the Court to vacate the Btu measurement rule promulgated by Order Nos. 93 and 93-A and remand the case to the Respondent with instructions to afford all parties a full and *fair* opportunity to comment on the substance, applicability and implementation of any proposed "Btu measurement rule" Respondent may seek to adopt.

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[2] Including Lone Star's list of parties, pursuant to the Court's Rule 8(e).

APPENDIX G

Excerpts from Reply Brief Of Petitioner Lone Star Gas Company in *Interstate Natural Gas Association Of America* v. *FERC*, Nos. 81-1690, *et al.*

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ARGUMENT

I. THE NGPA LEAVES IT TO THE DISCRETION OF THE COMMISSION TO DETERMINE THE METHOD OF BTU MEASUREMENT.

It is necessary at the outset to distinguish clearly the positions of the parties on the issue of what the NGPA requires with respect to Btu measurement. Both the Commission and the Producers now argue that the NGPA requires the measurement of Btu's on an as-delivered basis. Some of the Petitioners[3] take exactly the opposite position, arguing that the NGPA adopted the Commission's traditional regulatory policy of requiring the measurement of Btu's on a saturated basis.

Lone Star submits that while the legislative history of the statute does provide some support for the position of these other Petitioners, the most logical inference to be drawn from the statute is that Congress did not insist upon any particular method of Btu measurement; rather, it delegated this and similar administrative questions to the sound discretion of the FERC for resolution. Thus, Lone Star does not challenge the Commission's discretionary authority to adopt an as-delivered Btu measurement rule. Rather, Lone Star submits that in exercising this discretion, the Commission failed to comply with the notice and comment requirements of the due process clause and the APA.

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[3] Michigan Wisconsin Pipe Line Company, Natural Gas Pipeline Company of America, Transcontinental Gas Pipe Line Corporation and the Associated Gas Distributors.

The Producers' argument that the NGPA requires Btu measurement on an as-delivered basis is consistent with the position they have taken throughout the rulemaking proceeding and this judicial review. But it is startling that the Commission, or at least the Commission's counsel, is now for the first time advancing this argument, and indeed making it the linchpin of its position, for the Commission itself explicitly rejected this notion, at least in part, in Order 93-A. There it viewed the statute as leaving the "implementation of energy-referenced pricing for these sections [sections 104, 106 (a) and 109] to the Commission." Order No. 93-A, 46 Fed. Reg. 24,537, 24,539 (May 1, 1981) (R.115, 125).

It is also surprising that counsel's argument calls for a severe restriction in the discretionary authority that the Commission is ordinarily quite zealous in protecting. Indeed, the Commission could have avoided an interpretation so severely restricting its authority by interpreting the statute as giving it discretion and then adopting the rule through proper notice and comment procedures. That it did not do so, but instead is belatedly asserting through counsel that it had no discretion under the statute, can be explained only as an effort to manufacture *post hoc* a rationalization for rulemaking procedures that were plainly unlawful.

A. There Is Nothing in Either the Statute or Its Legislative History That Supports, Much Less Compels, the Conclusion That Congress Intended a Particular Method of Btu Measurement to Be Employed.

The starting point for resolving any issue of statutory construction is the language of the statute itself. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 558 (1979). And, as Justice Frankfurter once stated: "One more caution is relevant when one is admonished to listen attentively to

what a statute says. One must also listen attentively to what it does not say." [4]

No one disputes that the NGPA says that ceiling prices for natural gas are to be expressed on the basis of dollars per million Btu's. More important to the present issue, no one claims that the NGPA itself actually says anything about what method should be used to measure the number of Btu's contained in a given volume of natural gas. Further, no one disputes (although both Respondents fail to mention) that section 501 of the NGPA gives the Commission the authority and discretion to deal with matters of administration and definition not otherwise expressly dealt with in the statute.[5] Only one reasonable conclusion can be drawn from a statute that says nothing at all about the method to be used in determining the Btu content of gas but leaves issues of administration and definition to the discretion of the Commission: Congress intended to delegate the resolution of such technical issues to the sound discretion of the agency possessing the expertise to deal with them.

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[4] Frankfurter, *Some Reflections on the Reading of Statutes*, in 3 SUTHERLAND STATUTORY CONSTRUCTION 409, 419 (1974).

[5] Section 501 of the NGPA provides in relevant part:

SEC. 501. GENERAL RULEMAKING AUTHORITY.

(a) IN GENERAL.—Except where expressly provided otherwise, the Commission shall administer this Act. The Commission . . . is authorized to perform any and all acts (including any appropriate enforcement activity), and to prescribe, issue, amend, and rescind such rules and orders as it may find necessary or appropriate to carry out its functions under this Act.

(b) AUTHORITY TO DEFINE TERMS.—Except where otherwise expressly provided, the Commission is authorized to define, by rule, accounting, technical, and trade terms used in this Act. Any such definition shall be consistent with the definitions set forth in this Act.

See 15 U.S.C. § 3411. The Act itself defines a "Btu" only as "British thermal unit." NGPA § 2(30), 15 U.S.C. § 3301(30).

Neither the Commission nor the Producers are able to point to anything in the language of the NGPA itself to support their argument that the statute requires measurement on an as-delivered basis. Instead, they are reduced to arguing that by adopting Btu's as the unit in which ceiling prices would be expressed, Congress intended to make it "plain," "unequivocal" or even "explicit" [6] that those Btu's were to be ascertained on an as-delivered basis because that, they claim, results in a more accurate measurement of actual Btu content. And accurate measurement, they assert, is necessary to meet the congressional objective of making natural gas prices comparable to those of competitive fuels.[7]

This argument is faulty for a number of reasons, as we shall point out below.

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[6] Producers Brief at 13-14; *see* Commission Brief at 19-22.

[7] *See. e.g.*, Commission Brief at 20-21; Producers Brief at 5-6, 21-22.

APPENDIX H

Excerpts from Reply Brief Of Petitioner Laclede Gas Company Joining In And Adopting Reply Brief Of Lone Star Gas Company in *Interstate Natural Gas Association Of America* v. *FERC*, D.C. Cir. Nos. 81-1690, *et al.*

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* * * * *

Petitioner, Laclede Gas Company (Laclede), has urged the Respondent, the Federal Energy Regulatory Commission (Commission), to implement Order Nos. 93 and 93-A, here under review, on a prospective basis only. To this end, Laclede joined in and adopted as its own the Brief filed in this consolidated proceeding on March 19, 1982, by Lone Star Gas Company (Lone Star).

Laclede has reviewed the Reply Brief which is being filed herein by Lone Star. It concurs therein and adopts as its own the arguments supporting the Conclusion that the Court should (1) declare Order Nos. 93 and 93-A to be invalid for reason of their denial of due process and because they reflect the Commission's failure to comply with the provisions of the Administrative Procedure Act and the Natural Gas Policy Act of 1978; (2) direct the Commission to vacate its Regulation 18 C.F.R. § 270.204 which purports to implement those orders; and (3) remand the proceeding to the Commission with directions to initiate a lawful, rulemaking proceeding on the subject.

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FILED
FEB 17 1984
CLERK

Nos. 83-1171, 1173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Petitioners

v.

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *et al.*,

Respondents

BRIEF *AMICUS CURIAE* FOR THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK AND THE COMMONWEALTH OF KENTUCKY PUBLIC SERVICE COMMISSION IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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February 17, 1984

DiCesare and Associates Printing • Washington, D.C. • (202) 331-8101

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INTEREST OF THE PUBLIC SERVICE COMMISSION OF STATE OF NEW YORK AND THE COMMONWEALTH OF KENTUCKY PUBLIC SERVICE COMMISSION

The Public Service Commission of the State of New York and the Commonwealth of Kentucky Public Service Commission are regulatory bodies having jurisdiction over

the sale at retail of natural gas in the State of New York and the Commonwealth of Kentucky respectively. An integral component of the retail price of this gas, which has assumed a predominate importance in recent years, is the cost to pipelines for gas purchased from producers, and re-sold to distributors for ultimate consumption in New York and Kentucky. As the FERC's petition for certiorari makes clear, this case involves in excess of $1 billion in such cost nationwide, and comes at a time when natural gas is so costly in many areas as to be non-competitive with alternate fuels. Consequently, the two state commissions have a substantial interest in the outcome of this proceeding on behalf of natural gas consumers and distributors within their respective jurisdictions.

SUMMARY OF ARGUMENT

The two basic arguments advanced by the petitioners for the grant of certiorari are wholly without merit. First, under the decisions of this Court, the court of appeals was required to test independently the consistency of the challenged regulation with the language, structure and purposes of the Natural Gas Policy Act. In so doing, the court accorded the Commission's construction of the statute an appropriate degree of respect. Greater deference was not warranted because the underlying factors justifying such deference in other cases—such as the agency's use of its technical expertise in construing the statute, or the existence of a longstanding agency interpretation implicity approved by Congress—are absent here. Second, the Commission's authority under § 501 of the Natural Gas Policy Act to

define technical terms used in that statute cannot shield the challenged regulation from judicial review. The Commission's authority under § 501 is no more expansive than the identical power the Commission has long held under the Natural Gas Act, which has never been construed in the manner the petitioners now seek. Further, the § 501 claim was not presented to the court of appeals.

ARGUMENT

I. The Petitioners Have Failed To Show That The Court Of Appeals Erred In Any Manner In Vacating The Commission's Regulation, And Review By This Court Is Therefore Not Warranted.

In their petitions to this Court, the Federal Energy Regulatory Commission ("the Commission") and Exxon Corporation, *et al.* ("the Producers") have presented two basic arguments in support of this Court's granting certiorari to review the court of appeals' decision vacating the Commission's "dry rule" method for measuring the energy content of natural gas. First, petitioners claim that the court of appeals gave insufficient deference to the interpretation placed on the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. §§ *3301 et seq.*, by the Commission, the agency charged with the administration and enforcement of the statute, and instead substituted the court's judgment for that of the Commission. Second, they argue that the court of appeals erred in not recognizing that the interpretation of the NGPA, as expressed in the challenged regulation, was committed to the Commission's discretion, by virtue of the rulemaking authority conferred upon the agency in section 501 of the NGPA to define technical terms used in the statute. New York submits that neither of these contentions has merit and the petitioners have failed to offer any "special and important reasons" (Rule 17.1, Sup. Ct. Rev. Rules) why this Court should grant certiorari.

The petitioners' plea for greater deference to the judgment of the Commission overlooks this Court's oft-repeated admonition that "[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia..." *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965). As this Court has explained,

> ...the courts are the final authorities on issues of statutory construction...and "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."

Volkswagenwerk Aktiengesellschaft v. *FMC*, *390 U.S. 261, 272 (1968)*.

Thus, the court of appeals simply made the inquiry that it was required to make under the circumstances presented, *i.e.* to determine whether the Commission's construction of the NGPA, as manifested in the challenged regulation, was "inconsistent with the statutory mandate [or would] frustrate the policy that Congress sought to implement." *Federal Election Commission* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981). The court thus tested the regulation against the NGPA's language, structure, and legislative history, and properly concluded that the Commission's rule is "fundamentally at odds with the Btu measurement technique implicit in the NGPA." 716 F.2d at 15.

Although the court of appeals did grant the Commission's construction of the statute the "respect traditionally due" an agency's interpretation (*Id.*) it correctly declined to accord it the virtually controlling significance that the petitioners now claim it deserves, for there is simply no basis for such deference in this case. Thus, for example, the court noted

that the Commission's "technical experience with measuring Btu's is of limited usefulness in determining what Congress meant" in setting ceiling prices for natural gas on a Btu basis. *Id.* The Commission has made no attempt to refute this finding in its petition to this Court.

Similarly, the Commission's rule is not entitled to deference as a consistent and contemporaneous construction of the statute. On the contrary, the Commission's *initial* "contemporaneous" interpretation of the statute, as expressed in the interim rule published when the NGPA became effective, 18 C.F.R. § 270.204 (1978), 43 Fed. Reg. 56,448 (1978), was understood by both producers and consumers to continue the Commission's *prior* policy of requiring the energy content of natural gas to be measured on a standardized, saturated basis. See 716 F.2d at 6-7. The subsequent "permanent" rule which the court of appeals vacated, on the other hand, is a recent and radical departure from this long-standing policy.

Nor is the challenged rule entitled to respect as a longstanding interpretation which has received the implicit approval of Congress. The Commission does not claim to have advised the Congress with respect to the method of measuring Btu's during the drafting of the NGPA or to have received any indication that Congress was even aware of, much less approved, the Commission's present "interpretation". In sum, the underlying factors which appropriately have led courts to accord a high degree of deference to

administrative agencies in other cases[1] are simply not present here, and such deference is therefore unwarranted.

Finally, the petitioners' claim that the court of appeals disregarded the Commission's authority under § 501 of the NGPA is wholly without merit. There is not the slightest indication in the language or legislative history of the NGPA that §501 is intended to give the Commission the "ultimate discretion" (Commission Petition at 18) to adopt substantive rules free from judicial review.[2] Indeed, the language relied on by the petitioners in § 501 is verbatim the

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[1]See, *e.g.*, *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977), where the Court observed that:

> [v]arying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise.

See also *Zuber* v. *Allen*, 396 U.S. 168, 192 (1969):

> [judicial deference to an agency's construction of the statute] is only one input in the interpretational equation. Its impact carries most weight when the administrators participated in drafting and directly made known their views to Congress in committee hearings.

[2]As this Court has observed,

> It is now well settled that "judicial review of a final agency action by aggrieved persons will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."... The reviewing court must determine whether "Congress has in express or implied terms precluded judicial review or committed the challenged action entirely to administrative discretion.

Morris v. *Gressette*, 432 U.S. 491, 501 (1977). The Commission has offered no basis for concluding that Congress intended such a result here.

same as that which appears in § 16 of the Natural Gas Act (NGA), 15 U.S.C. § 717o, which has never been held to shield the Commission's regulations under that Act from judicial review in the manner the Commission is apparently now seeking. See, *e.g.*, *Mobil Oil Corp.* v. *FPC*, 463 F.2d 256, (D.C. Cir. 1971) *cert. denied*, 406 U.S. 976 (1972) (reversing the Commission's interpretation of the term "sale...for resale" in § 2(6) of the NGA with respect to royalty provisions of oil and gas leases); *Henry* v. *FPC*, 513 F.2d 395 (D.C. Cir. 1975) (affirming the Commission's construction of the term "natural gas" in § 2(5) of the NGA with respect to synthetic gas produced from coal).

Further, the petitioners' claim of error by the court of appeals on this point is most curious, since neither the Commission nor the Producers made *any* reference to § 501 in their briefs below. On the contrary, the Commission conceded that it was given "no independent authority under the NGPA to define 'Btu'", see 716 F.2d at 15. The petitioners' belated resort to § 501 at this time, in apparent contradiction to their position before the court of appeals, illustrates the shifting and uncertain nature of their defense of the Commission's regulation, and certainly is not a basis for granting plenary review of the decision below.

CONCLUSION

The petitioners have failed to demonstrate that the court of appeals erred in any manner in vacating the Commission's regulations or that review of the case is otherwise warranted by this Court. Indeed, to allow the Commission's "dry rule" to stand would reward natural gas producers with a windfall of enormous proportions *beyond*

the Congressionally-established price ceilings, which, as has been noted, "already took into account the conflicting interests of producers and consumers." *Pennzoil Co.* v. *FERC*, 645 F.2d 360, 379 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982). The petitions for a writ of certiorari should be denied.

Respectfully submitted,

THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

THE COMMONWEALTH OF KENTUCKY PUBLIC SERVICE COMMISSION

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Washington, D.C.
February 17, 1984